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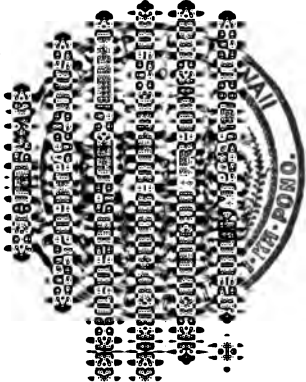
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REPORTS

DEED

Territory of Hawaii
1915



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THORITY
(THE COURT)

PRESS

FEB 9 1916.

ERRATA.

Page 338, line 14, figures "28" instead of "27";

Page 414, line 2, figures "15" instead of "14";

Page 570, line 20, "benelts" read "benefits".

JUSTICES OF THE SUPREME COURT

OF THE

TERRITORY OF HAWAII

DURING THE PERIOD COVERED BY THIS VOLUME.

CHIEF JUSTICE:

ALEXANDER GEORGE MORISON ROBERTSON.

ASSOCIATE JUSTICES:

ANTONIO PERRY,

Term Expired.

JOHN THOMAS DE BOLT,

Term Expired.

EDWARD MINOR WATSON,

Qualified March 19, 1914.

RALPH PETTY QUARLES,

Qualified April 2, 1914.

ATTORNEYS-GENERAL

WADE WARREN THAYER,

Resigned.

INGRAM MACKLIN STAINBACK,

Appointed April 17, 1914.

CIRCUIT JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

FIRST CIRCUIT.

FIRST JUDGES:

HENRY E. COOPER,

Term Expired.

CLARENCE W. ASHFORD,

Qualified August 17, 1914.

SECOND JUDGE:

WILLIAM L. WHITNEY.

THIRD JUDGES:

WILLIAM J. ROBINSON,

Term Expired.

THOMAS B. STUART,

Qualified December 7, 1914.

SECOND CIRCUIT.

SELDEN B. KINGSBURY,

Term Expired.

WILLIAM SEABROOK EDINGS,

Qualified August 17, 1914.

THIRD CIRCUIT.

JOHN ALBERT MATTHEWMAN.

FOURTH CIRCUIT.

CHARLES F. PARSONS.

FIFTH CIRCUIT.

LYLE ALEXANDER DICKEY.

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BY THE
SUPREME COURT
OF THE
TERRITORY OF HAWAII.

A. BORBA v. JOSEPH LEAL.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

SUBMITTED JANUARY 5, 1914.

DECIDED JANUARY 9, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

HUSBAND AND WIFE—*agency of wife for husband.*

The marital relation does not create a wife the agent of her husband to state an account on his behalf.

Id.—*necessaries—proof of delivery.*

In an action against the husband for goods sold and delivered to the wife, recovery cannot be had without proof of delivery.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$39.50 upon two separate causes of action, each being declared upon in one count only. The first is for \$31.75, upon an account alleged to have been stated by the parties on November 1, 1913. The second is for \$7.75, for goods alleged to have been sold and delivered by the plaintiff to the defendant between the first and the twentieth days of November, 1913. At the trial before the magistrate the

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only evidence adduced consisted of the testimony of one witness, called by the plaintiff. As recorded and certified by the magistrate that testimony was, in its entirety, as follows: "My name is J. F. Meranda. I know A. Borba plaintiff. I am manager of his store. I know defendant and his wife. A few days after the 1st of November last past I delivered a bill to Mrs. Leal at defendant's house. The amount of this bill was \$31.75 and was for groceries. Mrs. Leal promised to pay on the 10th; then afterwards on the 20th; the bill has not yet been paid. During the month of November, Mrs. Leal bought other groceries from plaintiff amounting to \$7.75 which is not yet paid, so that the full amount of \$39.50 is now due and owing from defendant to plaintiff." The plaintiff having rested, defendant moved for a nonsuit on the ground that there was no evidence tending to prove that an account was stated between plaintiff and defendant, or that the goods were delivered to defendant or his wife or that prior to suit demand was made by plaintiff on defendant for the amount claimed. The motion was denied and, defendant offering no evidence, judgment was rendered for the plaintiff for the whole amount claimed, with attorneys' commissions and costs. The present appeal is upon the points of law stated in the motion for nonsuit.

There is no evidence that the defendant personally admitted the correctness of the bill for groceries and his wife's admission was not binding upon him. There is no evidence tending to show that the wife was authorized by the defendant to act in his behalf in agreeing upon a statement of the accounts between him and plaintiff and the marital relation itself did not, as a matter of law, create her his agent for that purpose. 21 Cyc. 1234; 15 A. & E. Ency. Law 856; *Benjamin v. Benjamin*, 15 Conn. 347, 354; *Sawyer v. Cutting*, 23 Vt. 486, 489; *Baker v. Witten*, 30 Pac. 491, 492. Sometimes the circumstances of the case are held to be such as to justify a finding by implication that the wife was appointed by the husband as his agent for

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some particular purpose, but no such circumstances were attempted to be shown in the case at bar.

As to the second cause of action the evidence is simply that "Mrs. Leal bought other groceries from plaintiff." There was an entire lack of evidence tending to show that the groceries were delivered to the defendant's wife. Evidence of delivery was essential, at least in view of the fact that in no other way was it proven that the groceries were for the use of the defendant's wife or his family. The husband's statutory liability in this respect is confined to "debts contracted by his wife for necessities *for herself or family* during marriage." R. L., §2257.

Defendant asks in his brief in this court that a reasonable attorney's fee be allowed him under section 5 of Act 84, Laws of 1905 as amended by section 3 of Act 60 of the Laws of 1909. The question whether the statute referred to applies under the circumstances of the case at bar is not presented under any of the points of law upon which the appeal is taken and therefore it is not considered.

The judgment is set aside and the cause remanded with directions to enter a judgment of nonsuit and to dissolve the attachment and for such other proceedings, if any, as may be proper.

E. Murphy for plaintiff.

D. H. Case and *E. Vincent* for defendant.

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SOCIEDADE PORTUGUEZA DE SANTO ANTONIO
BENEFICENTE DE HAWAII v. JOSE DOS PAS-
SOS RODRIGUES.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED JANUARY 5, 1914.

DECIDED JANUARY 21, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MUTUAL BENEFIT INSURANCE—*expense incurred in suit to recover mortu-
ary benefit.*

A member of a benefit society having designated a beneficiary, thereafter designates the same beneficiary with others. In a suit brought by the beneficiary first named against the society to recover the mortuary benefit, the expense incurred by the society in the suit, under the by-laws of the society, shall be deducted from the benefit when paid, notwithstanding that the suit was decided in favor of the beneficiary and against the society.

OPINION OF THE JUSTICES BY DE BOLT, J.

This is a submission upon an agreed statement of facts. The facts thus agreed upon are substantially as follows: That the plaintiff is an incorporated benefit society, organized and existing under the laws of the Territory of Hawaii; that the defendant is now, and for many years has been, a resident of Honolulu and a member of the plaintiff society; that one of the objects of the society is the payment of the sum of \$1,700 upon the death of any member of the society to whomsoever such member may designate in a declaration to be duly filed with the society; that this sum of \$1,700 is obtained from a fund raised by assessment on the active members of the society and is collected and paid over by the society to the beneficiary or beneficiaries designated by the deceased member; that on January 26, 1912, and for more than five years prior thereto, one Joao Augusto Faria was a member of the society in good

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standing and entitled to designate the person or persons to receive the above mentioned sum of \$1,700 payable on his death; that Faria died in Honolulu on January 26, 1912, having prior thereto regularly filed with the society a proper declaration designating the defendant as his sole beneficiary; that on January 20, 1912, A. D. Castro, clerk of the society, received from Faria a declaration purporting to revoke the first declaration, which declaration of January 20, 1912, was also filed with the society; that the beneficiaries named in the declaration of January 20, 1912, except the defendant who was also named therein as one of the beneficiaries, are residents of Portugal and Brazil; that one of the claimants residing in Portugal having duly presented his claim to the society for payment, and the defendant having also duly presented his claim under the first declaration, the supreme board of the society thereupon considered the matter respecting the conflicting claims and refused to recognize the first declaration, holding that the second declaration was valid; that the defendant upon his claim being rejected brought suit in the circuit court of the first circuit against the society and recovered judgment for the sum of \$1,700 and costs taxed at \$91.90, which amount (\$1,791.90) the society paid; that prior to such payment, however, the society demanded from the defendant (Rodrigues) its expenditures in the above mentioned litigation, with which demand the defendant refused to comply; that the society expended in the litigation mentioned the sum of \$150 as counsel fees, which was reasonable for the services rendered, and \$25.70 in witness fees; that the society defended the suit above mentioned on the theory that the first declaration was revoked by the second declaration; that Article 15 (Chap. 12) of the by-laws of the society provides that "Any expense incurred by the society in verifications, judicial litigation and advertisements which may be indispensable, or for the transferring of funds, shall be to the charge of the parties claiming the mortuary benefit and shall be deducted from the same when paid"; that "the plaintiff claims that the defendant,

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being the sole beneficiary * * * , should pay the sum of \$267.60, being the costs of the litigation above set forth, on the ground that these expenses were incurred by the society in good faith and under the belief that nothing but a judicial proceeding could determine which of the two declarations should prevail"; that "the society interprets the by-laws to mean that where, in the exercise of honest judgment, they determine that a judicial proceeding is necessary to determine the beneficiaries of the fund that in such a case whether the society wins or loses the said society is entitled to its necessary expenses under the by-laws and such expenses are to be borne by the beneficiaries;" that "the defendant claims that the expenses referred to in Article 15 do not refer to the cost where the society, through its supreme board unjustly withholds from the beneficiary the funds due him and that the expenses referred to in the by-laws are expenses necessary to establish either the whereabouts, the relationship or other matters in connection with the beneficiary and not to be used up in contest against him."

The question thus presented by the submission for determination is, whether the plaintiff is entitled to recover from the defendant the sum of \$267.60. This question necessarily involves the construction of Article 15 and also the question as to whether it is a reasonable by-law.

The defendant contends that Article 15 "merely refers to expenses necessarily incurred by the society in verifying or upholding the beneficiary's claim, such as the taking of testimony in foreign countries, the paying of fees for necessary certificates, the retaining of counsel in order to protect the beneficiary and such matters that would legitimately be a part of the protection of said fund," and that "in the case at bar the society places itself in a position of hostility to the defendant."

The by-laws of a benefit society, when properly adopted, measure the duties, rights and liabilities of the members. 1 *Bacon on Benefit Societies and Life Insurance* (3d ed.) §79. The right of a member in the sum agreed to be paid at his

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death forms no part of his estate, but is merely a right or power in him to appoint the beneficiary who is to receive the benefit upon his death. *Id.* §237; *Monizi v. Santo Antonio Society*, 21 Haw. 591, 594. And it follows, necessarily, that the beneficiary must take, if at all, solely by virtue of the by-laws, which measure his rights as well as those of the member. In other words, the beneficiary named by a member is bound no less by the by-laws than the member himself; and the member in accepting membership accepts the by-laws and, if they are reasonable and legal, he is bound by them and conclusively presumed to know them. 1 Bacon, *supra*, §81. It follows, therefore, that a beneficiary claiming the benefit conferred upon him by a member of the society must accept, as incident thereto, whatever burden or liability may accompany such benefit. He cannot accept the benefit and reject the burden or liability incident thereto. They are inseparable.

What right then did the by-laws give to the defendant as the beneficiary of Faria? Faria being a member in good standing had the right, under Article 5 of the by-laws, to indicate "by written declaration, presented to the supreme board," the person or persons to receive the "death benefit fee," which is measured by Article 4, but cannot exceed the sum of \$1,700. Then follow (including Articles 6, 7 and 13) certain provisions respecting the disposition of the fund by the society to certain beneficiaries who take the benefit, in the event the member fails to name a beneficiary, or for some reason the beneficiary named cannot or does not take it. Articles 8 and 9 provide that the supreme board shall pay these death benefit fees to the beneficiaries in consecutive order, but may require satisfactory proof before making such payment. Articles 10 and 11 indicate the proof required and what shall be done with the fund if such proof cannot be obtained. Article 12 provides that the benefit shall be paid only from certain funds and that no interest shall be paid during the time any benefit remains unpaid. Article 14 provides that claims shall be presented within a certain time

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by the beneficiaries. Article 15 provides, as we have already observed, that any expense connected with the awarding of the benefit, "judicial litigation" included, shall be deducted from the amount of the benefit.

It will thus be observed from the provisions of the by-laws which we have above alluded to, that the society contemplated the possibility of various contingencies and situations arising and conflicting claims being presented with attendant expense and litigation. That there would be expense and litigation in connection with the claims of beneficiaries, from time to time, it was reasonable to expect and proper that provision should be made to meet it. Thus viewing the situation it seems clear that the expense incurred by the society in defending the suit brought against it by Rodrigues was reasonable and "indispensable," and clearly within the terms, as well as within the reason and spirit, of Article 15. That Article 15, as applied to the facts agreed upon, is a reasonable and proper by-law, there seems to be no room for question. It applies to all the members and beneficiaries alike, and in its application it tends to promote the well-being of the society as well as its members individually. Its purpose is to conserve and protect the funds in its keeping for the benefit of its members and beneficiaries to be named by the members, or those provided for by other by-laws of the society. 1 Bacon, *supra*, §85.

The fact that the suit was determined in favor of Rodrigues and against the society is immaterial. There is nothing in the record tending to show that the society unjustly withheld the benefit from the defendant, or that it placed itself in a position of hostility to the defendant, or that it was actuated by any improper motive, or defended the suit upon any theory other than for the benefit of all the members and to conserve the fund for the member legally entitled to designate a person or persons to receive it as a beneficiary or beneficiaries. The expense of the litigation was a necessary incident. It was in-

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dispensable under the circumstances disclosed by the record before us.

We, therefore, hold that the plaintiff is entitled to judgment against the defendant for the sum of \$267.60 and costs. Judgment may be entered accordingly.

A. D. Larnach (*F. Schnack* with him on the brief) for plaintiff.

L. Andrews for defendant.

ROBERT HORNER v. ALBERT HORNER AND THEO.
H. DAVIES & CO., LIMITED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 6, 1914.

DECIDED JANUARY 24, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

ESTOPPEL—misrepresentation—knowledge of facts.

In order to establish an estoppel based upon a misrepresentation of a material fact the party asserting the estoppel must show that he relied on the truth of the representation, and it is a rule of general application that there can be no estoppel for misrepresentation where the party asserting it knew the facts or had at hand ready means of ascertaining them before he acted.

OPINION OF THE COURT BY ROBERTSON, C.J.

This suit was instituted by Robert Horner against Albert Horner for the dissolution of the partnership of J. M. Horner & Sons, and for an accounting. H. Hackfeld & Company, Limited, was also made a party defendant upon the claim that, as former agent of the firm, it had, during the year 1911, received certain moneys aggregating the sum of \$32,500 of which it had paid to Albert Horner the sum of \$15,410.42 which it was alleged was in excess of his proportionate share as a member of the firm, the balance remaining in the possession of said Hackfeld & Compny. The plaintiff claimed to be entitled to

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receive from the defendants the sum of \$20,893.41. Demurrers interposed by the defendants were overruled. Thereupon H. Hackfeld & Company, Limited, represented to the court that it had no interest in the suit, that the sum of \$17,089.58 remaining in its possession was claimed by Theo. H. Davies & Company, Limited, as well as by the plaintiff, and offered to pay that sum into court to the end that the claimants might interplead and settle their claims between themselves. The court made an order that the money be paid into court in accordance with the motion; that H. Hackfeld & Company, Limited, be discharged from liability; and that Theo. H. Davies & Company, Limited, be substituted as defendant. The substituted defendant filed a lengthy plea and answer in which it set forth its claim to the fund in court except as to \$2627.50 which it conceded to be due the plaintiff. After a protracted hearing the circuit judge rendered a decision in favor of the defendant's contentions and, on September 19, 1913, entered a decree that the fund in court, except the sum of \$2627.50 held to be payable to the plaintiff, should be paid to Davies & Company; that the firm of J. M. Horner & Sons be dissolved; and that the plaintiff pay the costs of suit. The plaintiff appeals. There was considerable conflict in the testimony on minor points but there seemed to be little or no dispute as to the main and essential facts.

It appears that on December 5, 1911, the plaintiff agreed to sell and Davies & Company agreed to buy 1262 shares of the 2400 shares of the capital stock of the Kukaiau Plantation Company, Limited, a corporation operating a sugar plantation and a ranch on the Island of Hawaii, also the plaintiff's interest in the Kukaiau mill and landing of which the firm of J. M. Horner & Sons owned respectively one-half and one-fourth, it being understood by both parties that the plaintiff's ownership in said firm's interests in the mill and landing was in the same proportion as his ownership in the corporation. The purchase price agreed upon was \$260,000. Shortly thereafter the plaintiff

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ascertained that he was the owner of only 10-28 of J. M. Horner & Sons' interest in the mill and landing. The transfer of the shares of stock and conveyance of the other interests was delayed by reason of other litigation between the Horners, and in the meanwhile the plaintiff acquired an additional 8-28 interest in one-half of the mill and one-fourth of the landing. Albert Horner owned 1138 shares of the stock of the Kukaiau Plantation Company and 10-28 of the J. M. Horner & Sons' interest in the mill and landing. One-half of the mill and three-fourths of the landing were owned by the trustees of the estate of Theo. H. Davies. On April 24, 1912, Davies & Company paid the purchase price as agreed to to the plaintiff and received from him the 1262 shares of stock and a conveyance of the 1262-2400 part or share "in and to an undivided moiety or half of" the mill premises, mill and appurtenances, grinding contracts, etc., and the 1262-2400 part or share "in and to an undivided one-quarter (1-4) of the landing situate at said Kukaiau," with rights-of-way, etc. The parties supposed that the transaction was thus completed and closed. But on or about April 28, 1912, the plaintiff received certain information which upon investigation led to the ascertainment of certain facts of which he had no previous knowledge, as follows: that at various times during the year 1911 Davies & Company, acting as agent for the Kukaiau mill had made payments to Hackfeld & Company, as agent for J. M. Horner & Sons, of that firm's share of the profits made by the mill which aggregated the sum of \$32,500, the last payment, being of \$5000, having been made on November 30 of that year; that Hackfeld & Company had through mistake credited these sums upon its books to the account of the Kukaiau Plantation Company, of which also it was the agent; that to correct the error the amount was transferred on December 8, 1911, to the credit of the account of J. M. Horner & Sons; and out of it Hackfeld & Company had paid over the sum of \$15,410.42 to Albert Horner upon the supposition presumably that

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that would be his proper share according to his interest in the firm. The remainder of the mill profits constituted the fund paid into court by Hackfeld & Company. It further appears that on May 4, 1912, Davies & Company bought from Albert Horner an undivided 1138-2400 part or interest "in and to an undivided moiety or one-half share" in the Kukaiau mill and appurtenances, "in and to an undivided one-fourth share or interest of" the Kukaiau landing and its appurtenances, "in and to all of the property and assets, real, personal and mixed" of J. M. Horner & Sons, and "in and to all rights, claims and demands" of J. M. Horner & Sons and Albert Horner against Kukaiau Plantation Company. On December 20, 1912, Robert Horner sold to Albert Horner all his "remaining right, title and interest" in the Kukaiau mill and landing and their appurtenances, and "to all of the property and assets, real, personal and mixed, owned by" J. M. Horner & Sons, its or their successors or assigns, "but not conveying herein any interest in the sum of \$17,089.58 divided profits from said mill, now standing on the books of H. Hackfeld & Company, Limited, to the credit of J. M. Horner & Sons, but intending to convey any interest in undivided profits in the hands of T. H. Davies & Company, Limited, which profits have not been paid to said H. Hackfeld & Company, Limited, as agents for J. M. Horner & Sons, or otherwise, or to said Albert Horner." On December 24, 1912, Albert Horner sold to Theo. H. Davies & Company, Limited, all his "right, title and interest in and to all of that property and assets" conveyed to him by Robert Horner on December 20. Various attempts had been made by representatives of the plaintiff and of Davies & Company to make an adjustment and settlement of the controversy respecting the money held by Hackfeld & Company but without success, and this suit was filed on July 6, 1912.

The ultimate question upon which the case hinges is one of estoppel and arises out of the following facts. In agreeing to

purchase the interests of the plaintiff in the property at Kukaiau, Davies & Company had relied upon representations made by the plaintiff's agent, R. W. Shingle, to the effect that the plantation was practically out of debt and had a credit balance with its agent. There also had been furnished to Davies & Company by the plaintiff or his agent a statement over the signature of the treasurer of the Kukaiau Plantation Company, bearing date November 14, 1911, which showed that the company was indebted to Hackfeld & Company in the sum of \$205.-88 and that there was sugar to be accounted for of the value of about \$27,300. Davies & Company had asked to be furnished with a trial balance or other statement showing the condition of the plantation company's affairs. This was not supplied until March 6, 1912, when the treasurer's report, including the balance sheet for the year ending December 31, 1911, was sent by Mr. Shingle to Mr. Wodehouse, one of the directors of Davies & Company, who had taken part in negotiating with the plaintiff for the purchase of his property. The directors of Davies & Company seem not to have understood that the financial condition of Kukaiau Plantation Company was not as it had been represented to them by the plaintiff's agent until after the question came up with reference to the mill profits of J. M. Horner & Sons above referred to, although the treasurer's report showed an indebtedness to Hackfeld & Company of \$32,429.78. If the report was not examined no reason for not examining it was given. It contained the very information with which the directors had asked to be furnished, and without which, one of the directors testified, "we could not do any business." The change in the account was brought about presumably through the transfer on December 8, of the sum of \$32,500 to the account of J. M. Horner & Sons. The circuit judge rightly held that the sale to Davies & Company did not include any interest of the plaintiff in the funds or other property of J. M. Horner & Sons but that which was specifically mentioned, namely, the

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mill and landing and their appurtenances. But the circuit judge held that by the representation that the plantation company was out of debt which was relied on and acted upon by Davies & Company when it agreed to purchase the plaintiff's interests the plaintiff was estopped from showing the contrary; that Davies & Company was not bound by the transfer of the mill profits to the account of J. M. Horner & Sons; and that to avoid circuity of action the fund in court, except that portion which was conceded to be payable to the plaintiff, should be paid to Davies & Company. It was also held that the fact that Davies & Company received notice of the true state of affairs before it paid the purchase price to the plaintiff made no difference since it had already bound itself to purchase and could not have rescinded the transaction.

Counsel for the plaintiff contend that for several reasons which need not be enumerated here the circuit judge was in error in holding that all the elements of an estoppel were shown. Assuming that the facts proven were sufficient to give rise to an estoppel in the first instance we are of the opinion that as Davies & Company, before the transaction was closed by the transfer to it of the shares of stock and other property and the payment by it of the purchase money, namely, on March 6, had been furnished by the plaintiff's agent and had in its possession the balance sheet for December 31, 1911, which showed the actual state of the account between the plantation company and Hackfeld & Company, the result which otherwise might have ensued was obviated. The evidence showed that during the period over which these negotiations extended and prior thereto the plaintiff was not on friendly terms with his brother Albert or Hackfeld & Company, and was in fact not familiar with the financial condition of the plantation company, and did not know the state of the account between J. M. Horner & Sons and their agent until after April 24, 1912, but we assume that the circuit judge was right in holding that plaintiff's ignorance did not ex-

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cuse him. However, upon being furnished with the report of the treasurer of Kukaiau Plantation Company for the year 1911, Davies & Company was put in a position to know more of the financial condition of the plantation company than the plaintiff himself actually knew. That the plaintiff was chargeable with notice of the contents of the treasurer's report by reason of its having passed through the hands of his agent does not alter the situation. In contemplation of law both parties were apprised of the truth before the transaction was finally consummated.

Counsel for Davies & Company contend that the agreement of December 5, 1911, was an executed contract and, as such, it could not have been rescinded. But the contract of purchase remained executory until the purchase price was paid and the title to the property transferred. And we think the view expressed by the circuit judge that Davies & Company was bound to complete the transaction at all events was a mistaken one. Davies & Company have evinced no desire to rescind.

In the absence of special circumstances equity will relieve against a contract where the parties have acted under mutual mistake as to a material fact concerning the subject matter. But in order to establish an estoppel based upon a misrepresentation of a material fact the party asserting the estoppel must show that he relied on the representation and he cannot very well say that he relied upon an untruth when the truth was known to him. And it is laid down in the books as a rule of general application that there can be no estoppel by misrepresentation where the party asserting the estoppel knew the facts or had at hand ready means of ascertaining them. 11 A. & E. Enc. Law (2d ed.) 434; 16 Cyc. 738. These principles have been recognized in a great many cases among which the following may be referred to. *City of Fort Scott v. Eads Brokerage Co.*, 117 Fed. 51, 56; *Aldrich v. Scribner*, 146 Mich. 609; *De-benture Co. v. Hopkins*, 63 Kan. 678; *Ditch Co. v. Canal Co.*

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27 Col. 267, 274; *Vail v. Northwestern Ins. Co.*, 192 Ill. 567; *Leonard v. American Ins. Co.*, 97 Ind. 299, 306; *Hiskey v. Savings L. & B. Co.*, 27 Utah 409, 416; *Loper v. Robinson*, 54 Tex. 510, 516; *Hooper v. Whitaker*, 32 So. (Ala.) 355; *New York Life Ins. Co. v. Hord*, 78 S. W. (Ky.) 207; *Brant v. Virginia Coal Co.*, 93 U. S. 326; *Goo Kim v. Holt*, 10 Haw. 653, 661; *Bierce v. Hutchins*, 18 Haw. 511, 521.

The case at bar does not fall within that class of cases in which it is held that a party who has been guilty of an intentional fraud which has misled another and caused a change of position cannot escape the legal consequences of his fraudulent conduct by showing that the fraud might have been discovered by the other had he used due diligence.

From what has been said it follows that the plaintiff is entitled to receive the fund in court. Plaintiff's counsel now concede this to be the full amount due the plaintiff upon the accounting. The decree appealed from should be modified accordingly, and the case is remanded to the circuit judge.

D. L. Withington and *A. L. Castle* (*J. W. Cathcart* and *Castle & Withington* on the brief) for plaintiff.

I. M. Stainback (*Holmes, Stanley & Olson* on the brief) for defendant.

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MARIA DE SOUZA v. MANUEL SOARES.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

ARGUED JANUARY 12, 1914.

DECIDED JANUARY 26, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

FRAUD—burden of proof.

In a suit to cancel a deed on the ground that it was obtained by undue influence and misrepresentation the burden of proving the fraud is, in the absence of a fiduciary relation, upon the grantor who charges it.

EQUITY—finding of trial judge—weight.

The finding of a trial judge in an equity case upon an issue of fact the determination of which depends largely upon the weighing of conflicting testimony is entitled to great weight.

OPINION OF THE COURT BY PERRY, J.

This is a suit in equity for the cancellation of a deed. A sufficient summary of the allegations of the original bill is to be found in the opinion of this court upon the appeal from the decree sustaining a demurrer and dismissing the bill. 21 Haw. 330. The case stated in an amended bill subsequently filed is essentially the same in so far as the issues involved in the present appeal are concerned. After trial upon the facts the court below dismissed the bill. Hence this appeal.

The plaintiff's husband died at Wainaku, Hawaii, on February 29, 1908, leaving to her by will the land described in the bill and containing an area of 2.97 acres and devising to his children certain personal property. For the first month or two after his death the widow and her family continued to live in the home so devised to her and then took up their abode at the defendant's home. There they remained for two or three months. On June 22, 1908, the plaintiff executed to defendant a bill of sale of all of the furniture and a "horse, brake, harness, plows, cultivator and saddle" left by the deceased husband and four days later a deed of the land, for the consideration of \$1250

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all of which was paid by the defendant. These instruments were executed while plaintiff was living at the defendant's home. About the first of August of the same year plaintiff and her family left Hilo for California, being accompanied as far as Honolulu by defendant and his wife. Prior to her departure for California, and perhaps for some time thereafter, plaintiff was somewhat ill and nervous. A physician was called in once by her but declared that she did not need medical attention. She did the family washing and other household duties and walked long distances. After an absence of about nine months in California plaintiff returned to Hawaii, again living at the defendant's home for a period of about two weeks very shortly after her arrival. During all of the time above referred to, both before and after the execution of the deed and for about two or three years after plaintiff's return from California the relations between plaintiff on the one hand and defendant and his wife on the other were entirely cordial. The correspondence had during the plaintiff's absence was of a very friendly nature. To defendant's wife plaintiff wrote, *inter alia*, on November 7, 1908, "You have been more than a mother to me" and "My compadre Jose do Porto told them that my uncle Manuel is well delighted with the land, but I told them that I sold it of my own free will; that's what uncle Manuel has given his money for and he had not robbed any one." Not until February 24, 1912, were any steps taken toward securing a reconveyance of the land, demand being made on that day. This suit was commenced May 9, 1912.

The foregoing findings are based in part on undisputed evidence and in part on evidence the truth of which, though disputed, we find no reason to doubt.

The plaintiff's claim is, not that she was at the time mentally incompetent to convey land, but that she executed the deed at the defendant's pressing solicitation and in consequence of undue influence exerted upon her by defendant and his wife when plaintiff was ill and nervous and by the misrepresentation

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that plaintiff's house was haunted by ghosts and that she could not recover her health while living there. The defendant denies the truth of these charges and claims that the plaintiff made the sale and conveyance of her own free will and because she desired to leave with her family for California and to rid herself of undesirable neighbors. The evidence adduced upon this main issue was conflicting. The circuit judge, although basing his decree in part upon another ground, found "not only that the plaintiff had failed to establish fraud by a preponderance of the evidence but that the defendant's testimony of the absence of misrepresentation, though not absolutely convincing, carries with it more weight than the testimony of the plaintiff." Such a finding made by one who saw and heard the witnesses and was in a position more favorable than ours to weigh the evidence, is entitled to great weight. Moreover, our own conclusion concerning the comparative weight of the evidence on the two sides of the case is to the same effect. In giving her testimony the plaintiff was evasive and lacked in frankness. Her memory upon important points was very poor. Her testimony was such as not to admit of that reliance which would be requisite to justify the cancellation of a solemn deed. While the defendant was the brother of her husband, the evidence shows clearly that no relation of trust and confidence existed between the parties. Plaintiff admitted that in no transaction other than that of the deed had the defendant given her advice. Throughout that period she had an attorney whom she consulted freely on other matters and who drew the deed in question. The burden of proving the fraud charged was upon the plaintiff and that burden has not been successfully borne by her.

Gross inadequacy of consideration is sometimes in itself, perhaps, evidence of fraud but no evidence was adduced tending to show that the price paid for the land was inadequate. Two witnesses were asked by plaintiff for their opinions of the value of the property, but the evidence was excluded. In this reversible error was not committed. Joe Dias, whose opinion

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of the value of the building was sought, although a carpenter, was unfamiliar with the prices of lumber prevailing at the date of the deed and had never made an estimate of the cost of materials for any building save his own residence and that was several years prior to the sale to defendant. Joe de Porto, the other witness, was a stone mason and had bought and sold two pieces of land in Wainaku in or before the year 1900. Even if in strictness admissible the opinion of this witness would have been of very little weight. There is no reason for believing that if it had been admitted a decree for the plaintiff would have been required or justified. No other evidence of value was offered.

The decree appealed from is affirmed.

J. S. Ferry for plaintiff.

C. S. Carlsmith for defendant.

HENRY C. HAPAI, G. W. A. HAPAI AND NELSON
K. SNIFFEN *v.* MAY K. BROWN, ARTHUR M.
BROWN, HER HUSBAND, BLANCHE WALKER,
JOHN WALKER, HER HUSBAND, WALTER F.
DILLINGHAM, ROBERT W. ATKINSON AND
HENRY WATERHOUSE TRUST COMPANY, LIM-
ITED, A CORPORATION.

TAXATION OF COSTS.

ARGUED JANUARY 23, 1914.

DECIDED JANUARY 26, 1914.

ROBERTSON, C.J., PERRY, J., AND CIRCUIT JUDGE WHITNEY IN
PLACE OF DE BOLT, J.

COSTS—on appeal—irrespective of final judgment.

The party who prevails upon a writ of error is entitled to the costs of the appeal even though final judgment in the original action is against him.

OPINION OF THE COURT BY PERRY, J.

This was a statutory action to quiet title. The plaintiffs as well as the defendants claimed through one Keaka whose will was admitted to probate in 1868. At the first trial, during the presentation of the plaintiffs' case in chief, Keaka's will was received in evidence and defendants thereupon moved for judgment in their favor on the ground that one Paakuku, through whom they claimed (the plaintiffs' title was derived from the brothers and sisters of Paakuku), was therein named as sole devisee of the land in controversy. The motion was granted and judgment entered for the defendants. Upon a writ of error this court held that the devise was to Paakuku and her brothers and sisters as tenants in common, reversed the judgment and remanded the cause for further proceedings. At the second trial the court sustained defendants' contention, supported by proof, of a former judicial adjudication in favor of their predecessors in interest and again gave judgment for the defendants. Upon a second writ of error the judgment was affirmed.

Prior to the entry of the order remanding the cause in pursuance of the decision of this court upon the first writ of error, the plaintiffs filed a bill, in the total sum of \$60, for statutory attorneys' fees, expenses and costs of court incurred in securing a review of the first judgment in this court but by consent action in the matter was deferred. Plaintiffs now ask for the taxation of the costs as set forth in the bill.

No objection is made to the specific items charged. The taxation of any costs in favor of the plaintiffs is resisted, however, on the ground that final judgment was against them, thus showing that the action was one that should not have been instituted and that the defendants were wrongfully brought into court. Whatever force the argument might otherwise have, it cannot avail against the provision of our statute that "costs shall be allowed to the prevailing party in judgments rendered on appeal, *in all cases*," with certain enumerated exceptions and

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limitations which are inapplicable to the case at bar. The term "appeal" is used in the statute in its general sense and includes writs of error as well as other methods of appeal. Nor is the reference simply to final judgments. No other provision is to be found in our statutes authorizing the award of costs in this court in judgments not final in their nature. Certainly an intention to limit the authority to award costs to final judgments is not to be imputed to the legislature, particularly in view of the fact that the language used is sufficiently broad to include all judgments.

Kamalu v. Lovell, 5 Haw. 181, is not an authority to the contrary. In that case the plaintiff, who was finally unsuccessful after three trials, while contending that as he had prevailed in the first two trials before the jury he should not be required to pay the costs of those trials, conceded his liability to pay the costs of the two appeals as well as of the last jury trial; and the only question then under consideration was, as stated by the court, "whether the plaintiff, who obtains a verdict in his favor at the first trial of his case, is liable to pay the costs of this trial, if the final judgment be against him." It was held that he was, the court saying that "the defendant should not be compelled to pay them, for the ordering of a new trial means that the verdict against defendant was wrong." This reasoning would obviously not apply to the decision of the appellate court granting a new trial. The further statement that "the final liability to pay costs is not determined until after the final judgment" was made with reference to the sole issue then under consideration, i. e., the liability for the costs of the earlier trials. The question of the liability for the costs of the appeal was neither raised nor decided.

The motion to tax the costs of the appeal in favor of the plaintiffs is granted.

L. Andrews for plaintiffs.

Thompson, Wilder, Watson & Lymer for defendants.

JANUARY, 1914.

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JOHN K. SUMNER v. ELIAS L. JONES.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 13, 1914.

DECIDED JANUARY 30, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

DEEDS—*validity—mental capacity.*

Where advantage has been taken of a person of weak or impaired mind to consummate with him an unconscionable bargain, equity will set it aside.

EVIDENCE—*mental condition—opinion.*

An ordinary witness called to testify as to the mental condition of another should be required to state, at least in a general way, the facts upon which his opinion is founded.

SAME—*sufficiency of offer of proof.*

Where offers of proof were made of the opinions of witnesses as to the mental condition of the plaintiff without outlining the facts upon which the opinions were based, held, that the objections being on general grounds only the witnesses should have been examined.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a suit to set aside a deed executed by the plaintiff on the 15th day of July, 1911, purporting to convey certain lands and other property to the defendant. The bill alleges fraud and undue influence on the part of the defendant and mental incapacity on the part of the plaintiff, and that there was no consideration or an inadequate consideration for the conveyance. The plaintiff appeals from a decree dismissing the bill. The circuit judge filed no written opinion and no findings of fact were incorporated in the decree. From a consideration of the testimony which was sent up we are of the opinion that the averments as to undue influence were not sustained by the proofs. Much of the testimony making a voluminous transcript dealt with the conduct of the defendant and his wife toward the plaintiff subsequent to the date of the deed, it being claimed that they neglected and ill-treated him. Such

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testimony was not relevant to any issue in the case. On the other hand we find that testimony offered by the plaintiff in support of the averment of the bill that by reason of age and an enfeebled mind the plaintiff, at the time he signed and acknowledged the deed, did not understand or realize its nature or effect, was excluded.

The transaction seems to have been a very improvident one, and one which would be difficult to sustain in face of inequitable incidents. The deed recites a consideration of five hundred dollars and purports to convey, among other property, lands situated at Kalihi and Waikiki, Island of Oahu, which the defendant admitted to be worth, above incumbrances, about six thousand dollars. A separate agreement executed on the same date as the deed contains covenants on the part of the plaintiff discharging the defendant "from any and all claim or claims * * * * which may arise by reason of the insufficiency of the consideration mentioned in the deed," and to "fully protect and defend the second party in the full possession and enjoyment of the property so conveyed this day by said deed and as against all and every person or persons whomsoever * * *" and will, when necessary and requested by the defendant, "appear in court in behalf of said second party in any action which may hereafter arise with reference to the property so conveyed as aforesaid." The agreement also contains a covenant on the part of the defendant to "provide and set aside for the care, support and maintenance of said first party during his lifetime, a reasonable share, or proportion of the rents, issues and profits of the property this day conveyed to said second party by said first party, as hereinabove recited, the said share or proportion thereof to be paid as he shall see fit and proper." In a word, the proposition is that the plaintiff conveyed to the defendant the fee simple title to lands worth at least six thousand dollars in consideration of a cash payment of five hundred dollars and the agreement of the defendant to pay over to the plaintiff a "reasonable share" of the rents and profits of the

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property during plaintiff's lifetime. The property covered by the deed included the plaintiff's homestead and was all that he owned. The defendant testified that the understanding arrived at between the plaintiff and himself in conversations had prior to the time of the execution of the deed was that the plaintiff would deed over all his property for the consideration of \$500 and the agreement of the defendant to "take care of" the plaintiff "as long as he lives." By this we understand the arrangement to have been that the defendant should support the plaintiff during his lifetime. The written agreement providing for the payment of a reasonable share of the rents and profits of the property conveyed does not fully accord with the terms verbally agreed upon.

The law recognizes the right of the owner of property, being of sound mind, to sell and dispose of his property upon such terms as he may see fit or to give it away if he desires to, but when a man of upwards of ninety years of age conveys away all his property for an inadequate consideration the question whether he is possessed of such mental capacity as to enable him to comprehend the transaction and to understand the nature and effect of the deed at once suggests itself. This court has held that "if it appear that advantage has been taken of a person of weak or impaired mind to consummate with him an unconscionable bargain, equity will set it aside." *McKeague v. Kennedy*, 5 Haw. 347. In *Allore v. Jewell*, 94 U. S. 506, which was a suit to cancel a conveyance made by an elderly woman, and the question was whether she possessed sufficient intelligence to understand the nature and effect of the transaction, the court said, "It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance."

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There is some evidence in the record which we think tends to show mental weakness on the part of the plaintiff at or before the time of the transaction in question, and it may be that upon the record before us we would be justified in holding that the deed ought not to be allowed to stand. Possibly it would be a close question, and in view of the fact that counsel for the plaintiff offered the testimony of witnesses which it was claimed would throw additional light on the matter of the plaintiff's mental condition, we deem it proper to afford the opportunity, which the circuit judge denied, for the introduction of such testimony. Counsel for the plaintiff offered to show by the opinions of several witnesses based on their knowledge of and dealings with Mr. Sumner, that he was not competent to transact business affairs or capable of protecting himself in any matter involving his property. These witnesses, it appeared, had known the plaintiff for several years, one, who it is claimed, had lived at or frequently visited plaintiff's home and often conversed with the plaintiff, another who had been "more or less associated in his matters" and had had business and other dealings with him, and another, an attorney at law, who had handled plaintiff's business during a period extending from 1904 to 1907, during which period he had been in constant communication with the plaintiff. These offers of proof were objected to as being incompetent, irrelevant and immaterial, and the objections were sustained.

It is argued that these offers of proof were properly rejected because in order to render admissible the opinion of a witness as to the mental condition of another the witness must state the constituent phenomena upon which his inference is based. 3 Chamberlayne, Evidence, Sec. 1911. It is true that where an ordinary witness is called to testify as to the mental condition of a person he should be required to state in such detail as the circumstances permit, and at least in a general way, the facts upon which his opinion is founded. *id.*, Secs. 1892, 1893, 1912; *Queenan v. Oklahoma*, 190 U. S. 548. The facts must

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be such as the witness himself has observed. Chamberlayne, *supra*, Sec. 1826.

The offers of proof were not made as definite as they might have been, but on the other hand, the objections to them were rested only on general grounds, and did not specifically raise the point that the offers did not enumerate or outline the facts upon which the proposed statements of opinion would be based. Under the circumstances we think the offers of proof were sufficient, and that they required the examination of the witnesses. The competency of any of the witnesses to express an opinion as to Mr. Sumner's mental capacity would depend upon the nature and extent of his dealings with and observation of the old man, and the weight of the witness' opinion would depend upon the intimacy of his knowledge and his own capacity to form an intelligent conclusion.

The decree appealed from is reversed, and the case is remanded to the circuit judge with instructions to re-open it for the purpose of considering such testimony as to the plaintiff's mental condition at the time of the execution of the deed as may be offered agreeably to the views herein expressed, and for such further proceedings as may be proper.

L. Andrews (Andrews & Quarles on the brief) for plaintiff.

I. M. Stainback (Holmes, Stanley & Olson with him on the brief) for defendant.

Ideta v. Kuba, 22 Haw. 28.

Y. IDETA *v.* S. KUBA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 26, 1914.

DECIDED JANUARY 30, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

HIGHWAYS—obstruction—nuisance.

The unlawful obstruction of a highway is a public nuisance against the continuance of which a private individual who suffers special and irreparable injury, may obtain an injunction.

INJUNCTION—obstruction of highway—pleading.

In a bill to enjoin the obstruction of a public highway the thoroughfare should be described as a public road or highway, but the manner in which it became such need not be alleged.

SAME—right affected by delay.

Delay in commencing proceedings to enjoin a nuisance is a fact to be considered with other facts in determining whether an injunction should be granted.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a bill for an injunction in which, in the second, third and fourth paragraphs, the following averments appear:

“(2) That the land of complainant has from time immemorial had a public road and right-of-way thereto over respondent’s said land from the makai boundary of his said land up to and above the bridge of complainant along the west bank of said Pauoa stream of about twenty feet in width, for all purposes including the passage of wagons and other vehicles.

“(3) That the respondent has within three years last past closed up and blocked the Ewa side of said road along its entire length from the makai boundary of respondent’s land to the point where the road to complainant’s land crosses from respondent’s land over said stream, leaving a foot path only and making said road so narrow that there is not space sufficient for an ordinary wagon to pass over and along said road and in consequence of which complainant has no way of ingress or egress to or from his said land with an ordinary wagon.

“(4) That the business of complainant has been that of farming and the raising of stock and in order for complainant to

properly carry on his said business, it is indispensable that the said road be opened so that complainant shall be enabled to reach his land by wagon and that complainant will suffer great and irreparable injury and damage in case said road shall continue to be closed and blocked as aforesaid and is remediless by the strict rules of the law, and has redress only in equity."

The respondent demurred upon the grounds that the court is without jurisdiction of the subject matter; that upon the facts stated the complainant is not entitled to the relief asked; and that it appears that the complainant has an adequate remedy at law. The demurrer was overruled, and the circuit judge allowed an interlocutory appeal.

Counsel for the respondent contend that the bill shows that the acts complained of took place about three years ago and that as the remedy by injunction is a preventive one it should not be awarded upon such facts as are here averred; that the complainant is guilty of laches; that the alleged "public road" is not sufficiently described; that no more can be inferred from the averments of the second paragraph of the bill than that a private way has been obstructed in which case it would be essential that complainant's title should first be established at law; and that complainant has an adequate remedy at law under the statute relating to private rights of way (R. L. Chap. 143), or by an action for damages, and that the bill makes no showing of irreparable injury.

The language of the bill of complaint is not as clear as it might be, but we think it fairly appears therefrom that prior to the obstruction complained of a public road afforded access by wagons and other vehicles to the premises of the complainant; that such access has been and continues to be prevented by the act of the respondent so that complainant's premises can now be reached only by a foot path.

The thoroughfare alleged to be obstructed should be described as a public highway, but the manner in which it became such need not be alleged. 20 Enc. Pl. & Pr. 938. The foregoing view of the averments of the bill disposes of several of the points

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made by counsel for the respondent. An unlawful obstruction of a public road or highway is a public nuisance which may be proceeded against by the government or by a private individual who has been specially injured by it. Special and irreparable injury is sufficiently averred. Assuming the alleged facts to be true, the complainant is entitled to the unobstructed use of the road and is not to be compelled to accept in lieu thereof such damages as he might be able to prove in an action at law. See Elliott, *Roads and Streets* (2d ed.) Sec. 665; *Draper v. Mackey*, 35 Ark. 497; *Harding v. Cowgar*, 127 Ind. 245, 249. The proceedings before commissioners authorized by chapter 143 of the Revised Laws relate to controversies respecting *private* ways and water rights, and even as to such cases the statute has been held not to have affected the circuit judges in the exercise of their ordinary jurisdiction in equity. *Wailuku Sugar Co. v. Cornwell*, 10 Haw. 476; *McBryde Sugar Co. v. Koloa Sugar Co.*, 19 Haw. 106, 116.

Assuming that delay may affect a claim to an injunction against the maintenance of a public nuisance as it has sometimes been held with reference to private nuisances, yet, as held by the supreme court, "The better opinion now is that it is only a fact to be considered by the chancellor in connection with the other facts of the case by which his discretion is to be guided." *Parker v. Woollen Co.*, 2 Black 545, 552.

We hold that the bill of complaint states a case for equitable relief, and that the circuit judge sitting in equity has jurisdiction to hear and determine it. The order overruling the demurrer is affirmed.

J. A. Magoon for complainant.

L. Andrews (*Andrews & Quarles* on the brief) for respondent.

Territory v. Ah Goon, 22 Haw. 31.

TERRITORY OF HAWAII *v.* AH GOON.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

SUBMITTED JANUARY 27, 1914.

DECIDED FEBRUARY 5, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

STATUTES—*language of—opium—yen shee.*

A statute (Act 144, Laws of 1913) which declares that "any person who shall use or smoke opium or have the same in his possession," except as provided in sections 1399 and 1401, R. L., "shall be guilty of a misdemeanor and shall be punished" as therein prescribed, is not violated by one who uses or smokes yen shee or has the same in his possession.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal on points of law from a judgment of the district magistrate of Wailuku, County of Maui, finding the defendant guilty of the offense of using opium and having the same in his possession contrary to the provisions of Act 144, Laws of 1913, which reads: "Any person who shall use or smoke opium or have the same in his possession, except as provided in section 1399 and section 1401 of the Revised Laws, shall be guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars or more than one hundred dollars, or by imprisonment not more than six months." Sections 1399 and 1401, R. L., provide for the sale of opium by any qualified physician or surgeon, or any person holding a license to sell poisonous drugs, and that the Territory and board of health shall not be prevented from using or distributing drugs or medicine.

The charge entered against the defendant, and upon which he was tried, convicted and sentenced to pay a fine of fifty dollars and costs, was as follows: "That Ah Goon, at Wailuku, County of Maui, Territory of Hawaii, on the 26th day of November, A. D. 1913, did use opium and have the same in his possession, he, the said Ah Goon, then and there not being a duly qualified physician or a person holding a license to sell

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poisonous drugs, as by law required, and did then and there and thereby violate the provisions of Act 144 of the session laws of 1913."

The case was submitted to the magistrate upon the following stipulation of facts: "That on the 28th day of November, 1913, at Wailuku, County of Maui, Territory of Hawaii, the defendant did use, smoke and have in his possession what is commonly known as 'in shee,' also called 'yen shee'; that 'in shee' is the residuum from what is commonly called opium after having been once smoked, and that the said 'in shee' is an article of commerce and contains one and one-half per cent of opium."

The points of law upon which the appeal is prosecuted are as follows: "That the agreed statement of facts show that the defendant has committed no crime; that the use, possession and smoking of yen shee or in shee is not prohibited by the laws of the Territory of Hawaii; that no provision is made for any punishment of persons who use, smoke or have in their possession yen shee or in shee; that the punishment imposed is contrary to law and in violation of the rights of the defendant."

The crucial question presented by the record is, whether the statute prohibits the use, smoking or possession of yen shee? The theory upon which the prosecution proceeds is, that yen shee and opium are one and the same thing and equally within the legislative intent, as well as within the mischief sought to be prohibited by the statute. The application of this theory, however, would render it necessary to extend the scope of the statute by implication beyond its express terms. This, in our opinion, would be judicial legislation,—the creation of a criminal offense by construction. *State v. Lovell*, 23 Ia. 304, 306. "The court cannot by construction create a crime or offense. * * * The act constituting the offense must be within both the letter and the spirit of the statute." *Rep. v. Ben*, 10 Haw. 278, 281. See also *In re Brito*, 7 Haw. 42, 44; *Rep. v. Li Shai*, 10 Haw.

262, 264; *Ter. v. Fernandez*, 15 Haw. 133; *Ter. v. Sing Yuen*, 18 Haw. 611, 613.

That the use of yen shee may be within the mischief sought to be remedied by the legislature in the passage of the statute in question is immaterial; the statute, in express terms, is aimed at the use of opium only, and not at the use of yen shee, regarding which it is silent. "A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy of the law. 'It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms.'" 2 Lewis' *Suth. Stat. Const.*, §521. See also *Field v. United States*, 137 Fed. 6; *In re McDonough*, 49 Fed. 360.

Opium and yen shee are separate and distinct articles of commerce. When opium is mentioned we know what is meant; when yen shee is mentioned we know what is meant; and when morphine, laudanum, or paregoric is mentioned (each of which, like yen shee, contains a certain percentage of opium) we know what is meant. It could not be urged with any show of reason that because the statute in question prohibits the use of opium, it also prohibits the use of morphine, laudanum and paregoric. Obviously, the statute does not prohibit the use, smoking or possession of yen shee.

The statute, however, as we view it, does not require construction. "It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resort to other means of aiding in the construction." 2 Lewis' *Suth., supra*, §366. The legislature in the enactment of the statute in question, in plain and unmistakable terms, free from doubt or ambiguity, has declared that "any person who shall

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use or smoke opium or have the same in his possession, except as provided in" sections 1399 and 1401, R. L., "shall be guilty of a misdemeanor and shall be punished" as therein prescribed. The language of the statute being clear and unambiguous, it must, therefore, be held to mean what it plainly expresses, beyond which we cannot go. The use of yen shee not being expressly prohibited, it follows that the defendant has not violated any of the provisions of the statute.

The judgment of the district magistrate is reversed and he is directed to discharge the defendant.

D. H. Case, County Attorney of Maui, for the Territory.

Andrews & Quarles and E. Murphy for defendant.

CHARLES HARTWELL CHATER (A MINOR), BY HIS NEXT FRIEND AND GUARDIAN, CHARLES H. CHATER; CHARLES H. CHATER IN HIS OWN RIGHT AND AS GUARDIAN OF SAID CHARLES HARTWELL CHATER (A MINOR), AND CHARLES H. CHATER AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE LEE HARTWELL CHATER, DECEASED, *v.* ALFRED W. CARTER, TRUSTEE, ALFRED W. CARTER, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ALFRED S. HARTWELL, DECEASED, MABEL R. HARTWELL, AND THE HAWAIIAN SUGAR COMPANY, A CORPORATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED FEBRUARY 17, 18, 1914.

DECIDED MARCH 6, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TRUSTS—*contingent interest—resulting trust—interest by implication.*

H, on March 27, 1909, delivered to C a certificate of stock in a corporation made out in the name of C as trustee for L, a recently married daughter of H, together with a letter in which it was

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stated *inter alia* that "the trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family." The letter contained other directions with reference to other certificates of stock given at the same time either directly or in trust for other daughters. L gave birth to a son on August 30, 1909, and died on September 3, 1909. After the delivery of the letter and certificate to C the dividends on the stock were forwarded to L by H or C, receipts therefor being given by L to C as trustee. After the death of L, C paid the dividends to H and finally endorsed and delivered back to H the certificate of stock which thereupon was given by H to his daughter M. Held, that the gift of the stock to L was contingent upon her being alive on January 1, 1913; that the gift lapsed upon the death of L and the trust resulted to H; that there was not an implied gift to L's son upon the death of his mother; and that the gift of the dividends was intended to be solely to L personally, was contingent upon her being alive at the time the direction to pay was to take effect, and lapsed by reason of her death before that time.

OPINION OF THE COURT BY ROBERTSON, C.J. •

This is an appeal from a decree dismissing a bill in equity for an accounting for certain shares of the capital stock of the Hawaiian Sugar Company, a corporation, and the dividends declared thereon since August, 1909, with interest. In the court below the parties agreed upon the facts, their stipulation, as amended in this court, reading as follows:

"Alfred S. Hartwell died in Honolulu on the 30th day of August, 1912, leaving a will, duly proved in the Circuit Court of the First Circuit, Territory of Hawaii, on the 15th day of

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October, 1912. The defendant Alfred W. Carter was appointed executor in said will and qualified and is now acting as such. Charles A. Hartwell, also appointed, did not qualify. The deceased was from 1868 to 1874 a judge of the Supreme Court of Hawaii, from 1874 to 1904 one of the leading attorneys in Hawaii, and from 1904 to 1907 a judge, and from 1907 to 1911 chief justice of the Supreme Court of Hawaii. He was the father of seven daughters all of whom except Charlotte Lee Hartwell Chater now survive, to-wit, the five named in the instrument dated March 27, 1909, attached to the complaint herein and marked 'Exhibit A,' namely: Charlotte Lee Hartwell Chater, Mabel R. Hartwell, Dorothy Hartwell, Bernice Hartwell and Juliette Hartwell, 'Lottie Lee,' named in said instrument Exhibit 'A,' being Charlotte Lee Hartwell Chater, and 'Mabel,' being Mabel R. Hartwell, and also Madeline Hartwell Judd and Edith Hartwell Carter, the latter being then and now the wife of Alfred W. Carter, defendant. Charlotte Lee Hartwell Chater had been married to the complainant, Charles H. Chater, shortly before the date of said instrument, to-wit, on July 15, 1908, and was then on March 27, 1909, of the age of thirty-two years and without children. The daughters named in said instrument other than said Charlotte and Mabel, were at that time unmarried. All the daughters were of age. Mabel had children, who still survive.

"Charlotte Lee Hartwell Chater died in Natick, in the County of Middlesex, Commonwealth of Massachusetts, where she had been residing with her husband, Charles H. Chater, on the 3rd day of September, 1909, in childbirth, intestate, leaving the complainants, her husband, Charles H. Chater, and one child, the complainant, Charles Hartwell Chater, who was born on August 30, 1909; thereafterwards, on the 15th day of November, 1909, the Probate Court of the County of Middlesex duly appointed the complainant, Charles H. Chater, administrator of the estate of said Charlotte Lee Hartwell Chater, and issued letters to him, and he duly qualified as such and is now acting; and said Probate Court, on the 17th day of December, 1909, duly appointed said Charles H. Chater guardian of the person and estate of the complainant, Charles Hartwell Chater, and issued letters of guardianship to said Charles H. Chater, who qualified and is now guardian of said Charles Hartwell Chater.

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"The Hawaiian Sugar Company is and was at all times hereinafter named a corporation existing under the laws of the Territory of Hawaii, having its usual place of business in Honolulu, in said Territory.-

"Said Alfred S. Hartwell, being a man of ample means and the owner of a large number of shares in the Hawaiian Sugar Company, on the 27th day of March, 1909, transferred to the name of Alfred W. Carter, as trustee for Charlotte Lee Hartwell Chater 585 of such shares and caused a certificate to be issued to the said Alfred W. Carter as trustee for Charlotte Lee Hartwell Chater for said 585 shares, and delivered said certificate to said Alfred W. Carter, Trustee, and, at the same time, executed and delivered a declaration of trust, as follows:

"Honolulu, T. H., March 27, 1909.

"Mr. Alfred W. Carter,

"City.

"Dear Alfred:—

"I enclose certificate in your name as trustee for Juliette for 415 shares and another certificate in your name as trustee for Dorothy for 420 shares, another in your name as trustee for Lottie Lee for 585 shares, also a certificate in Lottie Lee's name (being those which I gave her before she was married) for 250 shares, also three blank forms of receipts in duplicate for you to sign and hand to me, if you please.

"The trust for both Juliette and Dorothy is to see that the dividends are paid to them, or, what I presume would be better, placed to their credit with Bishop & Co. where each of them now has an account. If either of them should die before returning here her shares are to be divided between the two surviving unmarried girls; if neither of them returns both their shares to go to Bernice, if living, otherwise to all the surviving sisters equally. I am aware that this is simply a temporary arrangement—I hope it is—and that either of them has a right to call upon you to make over the shares to her at any time.

"The trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of three years she shall have no child living,

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in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.

"I also enclose for you to retain for Mabel Certificate No..... in her name for 200 shares Hawaiian Sugar Stock.

"I have been arranging with the Brewers to draw my salary and to pay Lottie Lee and Mabel on the 15th of each month their dividends. I can continue to do this although it may be better for some reasons to arrange with Alexander & Baldwin to remit the dividends directly to them from New York, in which case there would be a charge of 20 ct. a hundred unless they shall accede to my request to make no charge for exchange.

"I also enclose certificate in Bernice's name for 420 shares which I am now giving her and also for 165 shares which I gave her recently. I do not know where the certificate for her 250 shares which I formerly gave her is. I think it would be wise if the certificates of all the girls should be retained in your office and to have that understood by them.

"Very Truly,

"ALFRED S. HARTWELL.

"This declaration of trust is the aforesaid 'Exhibit A.'

"At the same time, similar certificates were issued and delivered to said Alfred W. Carter, as trustee for Juliette Hartwell and Dorothy Hartwell, for the shares mentioned in said declaration.

"On the same day Alfred S. Hartwell caused a certificate to be issued in the name of Charlotte Lee Hartwell Chater for the 250 shares referred to in the declaration of trust, which certificate was also handed to said Alfred W. Carter.

"Charlotte Lee Hartwell Chater was duly notified of these transactions, the information coming through a letter from Alfred S. Hartwell to Charles H. Chater on March 29, 1909, as follows:

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"Honolulu, T. H., March 29, 1909.

"Mr. Charles H. Chater,

"South Natick, Mass.

"My Dear Mr. Chater:—

"I have not been a good correspondent for I have had many cares and responsibilities resting upon me.

"I am simply writing to you now about a matter of Lottie Lee's which I do not wish to write to her under present conditions or to trouble her at all about it. It is this—before her marriage I had given her 250 shares of the Hawaiian Sugar stock paying regularly a monthly dividend of \$75. Since a sale was made last summer of my large holdings in the American Sugar Co. (Molokai ranch) I have paid off the heavy indebtedness which had been burdening me for several years and am now dividing the shares in the Hawaiian Sugar stock which formerly had been pledged for my indebtedness in such way as to give Lottie Lee 585 shares more, which I am placing with Alfred W. Carter in trust (as explained in my letter to him) 'to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to her or hold them in trust for her benefit as she may in writing request, unless at the end of the three years she shall have no child living, in which case the trustee to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family.'

"I have been in the habit of arranging with Charles Brewer & Co. in Boston to collect my salary and pay Lottie Lee \$200 a month on my account; I am now writing them to send her \$250 instead on April 15, May 15, and June 15. Alfred, as her trustee, will require receipts for the dividends on the 585 shares which he holds in trust, which will be \$175.50 a month. I accordingly enclose receipts for Lottie Lee to sign and send to him.

"I will also cause the Brewers to continue to send the \$75 a month for April, May and June dividends on the 250 shares,

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which I will collect here and have them pay on my account. One reason why I do not arrange for longer payment by them is that I am quite likely to go east in June—I hope to do so—and to see you all—and am aware of the uncertainties of life, you know. Alfred will arrange after that to send a bill of exchange to Lottie Lee monthly for the entire \$250.50 coming to her, less exchange, which will be a small sum if he arranges to have the New York agents do this, which I think he will.

“It might also be well for Lottie Lee to give Alfred her proxy as to the 250 shares which I am turning over to him, a form for which I am enclosing herewith.

“I am making the same apportionment of my property between Madeline, Lottie Lee, Juliette, Bernice and Dorothy, future arrangements for the others to await contingencies, and I am in my will giving my homestead to Juliette, Bernice and Dorothy, while there will always be a home where any of their sisters and their families will be welcome.

“I am much gratified to learn that you are going out to South Natick. I shall hope to be able to go out there this summer, in which case I may arrange to live in the old cottage (Aunt Martha’s house) where my childhood and many of my later years were spent. I do not mean that I am not well assured of a welcome from you and Lottie Lee in the new cottage, but by going into the old house I shall feel free, as you can see, to get a friend or two out there at any time when it will not interfere with Mabel and her family going there. At any rate I have not been there since my sister’s death and that will be the place in which I should like to stay, it now seems to me, when I am east in the summers.

“You will know best whether to trouble Lottie Lee just now to look this letter over. Do entirely as you think fit.

“Faithfully yours,

“(Sgd.) ALFRED S. HARTWELL.

“Alfred W. Carter endorsed and deposited the dividend warrants on said 585 shares for the months of April, May and June, 1909, in the bank to the credit of Alfred S. Hartwell, who subsequently paid the amounts of the dividends over to Charlotte Lee Hartwell Chater, who thereafter sent to said Alfred W. Carter receipts for the same, the receipt for the dividends for the month of April reading as follows, the receipts for the months of May and June being in the same form:

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'Boston, Mass., April 15, 1909.

'Received of Alfred W. Carter, Trustee, per Charles Brewer & Co., one hundred seventy-five and 50-100 (\$175.50) dollars, April dividends on 585 shares Hawaiian Sugar Co. stock, held by him as my trustee.

'(Signed) CHARLOTTE L. H. CHATER.'

"Alfred W. Carter endorsed and deposited in the bank the dividend warrants on said shares for the months of July and August, 1909, and sent the amounts of the said dividends to Charlotte Lee Hartwell Chater.

"Alfred W. Carter endorsed and delivered the dividend warrants on said shares for September, 1909, and the following months to A. S. Hartwell, until the transfer of said shares to A. S. Hartwell.

"After the death of said Charlotte Lee Hartwell Chater the defendant, Alfred W. Carter, delivered to her said administrator said certificate for 250 shares, but without the knowledge or consent of the complainants, endorsed as trustee for Charlotte Lee Hartwell Chater, said certificate for 585 shares to said Alfred S. Hartwell, and a new certificate was on November 29, 1909, issued to said Alfred S. Hartwell in his own name by the defendant the Hawaiian Sugar Company. On the 18th day of May, 1910, said Alfred S. Hartwell transferred said certificate for 585 shares to the defendant, Mabel R. Hartwell, and the defendant Hawaiian Sugar Company issued a new certificate on that date to said defendant, Mabel R. Hartwell, in her name for 585 shares, she not knowing at the time that the stock was the same stock which her father had previously transferred to Alfred W. Carter, Trustee, for her sister, Charlotte Lee Hartwell Chater, and having no knowledge of the terms of that trust but receiving the same without consideration and as a gift from her father and not on any secret trust or understanding.

"It is conceded, if admissible, that the said transfer of said stock by Alfred W. Carter to Alfred S. Hartwell was made by said Alfred W. Carter in good faith and on the demand of said Alfred S. Hartwell and under the advice of counsel sought and received by said Alfred W. Carter, and that the said transfer of said stock by Alfred S. Hartwell to Mabel R. Hartwell was made by said Alfred S. Hartwell in good faith and under the

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advice of counsel sought and obtained by him after the demand for said stock made on him by said Charles H. Chater.

"On the 1st day of July, 1910, the Hawaiian Sugar Company declared a stock dividend of 50 per cent, paid the said Mabel R. Hartwell \$20 for a fractional one-half share, and on July 2nd issued to the said Mabel R. Hartwell as said dividend 292 shares additional stock, which were included in a new certificate for 1552 shares in Mabel R. Hartwell's name, which 1552 shares are still standing in her name.

"\$877.50 was paid to A. W. Carter, Trustee, between September 3, 1909, and November 29, 1909; \$526.50 to Alfred S. Hartwell between November 29, 1909, and January 1, 1910 and the further sum of \$1170.00 to Alfred S. Hartwell between January 1, 1910, and May 18, 1910; \$11,109.00 to the defendant, Mabel R. Hartwell between May 18, 1910, and January 1, 1913; and the further sum of \$789.30 to the defendant, Mabel R. Hartwell, between January 1, 1913, and March 18, 1913, the day of the filing of the bill, as dividends on the stock in suit, making a total of \$14,472.30, of which \$12,279.00 was paid between January 1, 1910, and January 1, 1913, none of which has been paid to the complainants or either of them although duly demanded, as has been the transfer to complainants of said stock.

"Dividends at the rate of 30 cents per share have been declared on the 15th day of April, of May and of June, 1913, and at the rate of 20 cents per share on the 15th day of each month since June, 1913, but no dividend on said 877 shares has been paid since March 18, 1913, to said Mabel R. Hartwell, the dividends on said 877 shares having been retained by said Hawaiian Sugar Company.

"The estate of said Charlotte Lee Hartwell Chater is not indebted to any one; the known heirs are the complainants, Charles H. Chater and Charles Hartwell Chater; and the said Charles H. Chater consents that any interest which he may have in said stock or said dividends may be accounted for and paid to himself as guardian for said Charles Hartwell Chater.

"The market value of stock of the Hawaiian Sugar Company per share was on the 29th day of November, 1909, \$36.25, on the 18th day of May, 1910, \$58.00, and on March 18, 1913, the day of the filing of this bill, \$34.75 per share."

Counsel for the complainants contend that it is shown that

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there was a gift to a child recently married from her father which was either a settlement or an advancement, similar gifts having been made to other daughters at the same time; that the gift was complete and irrevocable upon the transfer and delivery of the certificate of stock issued to Carter as "trustee for Charlotte Lee Hartwell Chater;" that the property having passed out of Mr. Hartwell it could return to him only by way of a resulting trust following the consideration or lack of consideration, but as in this case the advancement was supported by love and affection, a good consideration, the trust, following that consideration, should result to the daughter or her estate; that, being a completed gift, the burden is upon the respondents to show an intention that the title to the stock should revest in the donor; that where trusts are engrafted on an otherwise completed gift and any portion of the trust fails the resulting trust is to the donee; that the intent of the donor creating a trust *inter vivos* is to be ascertained and followed as in the case of a will, and that technical rules of law are not allowed to override this intention; that so construed it is clear that the stock was given in trust for Mrs. Chater as the beneficiary, except as modified by the letter, and that Mr. Hartwell did not intend any beneficial interest for himself; that the words "if she shall then be living" refer to Mrs. Chater's enjoyment of the principal and should not be construed to affect the vesting of the gift so as to make it conditional; and that there was an implied gift to Charles Hartwell Chater on the death of his mother before January 1, 1913, he surviving at that time; also that the gift of the dividends was an immediate gift, free of any contingency, which passed to the administrator.

Counsel for the respondents emphasize the facts that the payment of the dividends to Mrs. Chater was postponed until a time posterior to the expected birth of the child, and that there was no express provision for the child. The reason for this, it is urged, was distrust of Mr. Chater on the part of Mr. Hartwell and the latter's intention that the former was not to

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share in the trust fund either directly or indirectly as guardian of the child. It is said that Mr. Hartwell undoubtedly contemplated the birth of the child and the possibility that Mrs. Chater might die in child-birth, she being 32 years of age at the time. And it is pointed out that the expressed desire of the donor was that the stock should remain in his family. Further, it is argued that "Judge Hartwell thought that if Mrs. Chater survived the birth of the child in the autumn and continued to live for the following few weeks until January 1, he could reasonably count on her living a considerable period longer. He took the arbitrary period of three years as a reasonable time within which Mr. Chater would fully and finally show his quality as a husband and father, and within which also would be determined whether Mrs. Chater, who was thirty-two or thirty-three years old, would have any more children and would survive their birth, and whether the children would survive the first perilous stages of infancy. Judge Hartwell therefore provided that the dividends should be paid to Mrs. Chater during the three-year period beginning January 1, 1910, and that if at the end of that period she should be living and should have a child, the principal of the trust fund should be transferred to her or held in trust for her benefit as she might in writing request, or if she should be living and have no child the trustee should hold the stock giving Mrs. Chater the income for life, and at her death transferring the principal to the then surviving sisters and children;" that "It is immaterial whether Judge Hartwell ever thought of the resulting trust to himself. If he intended that the trust fund should not go to Mr. Chater or the child there is no one to take it and a resulting trust arises as a matter of necessity since the trustee cannot hold for himself;" that the gift of the stock at the end of three years was expressly contingent on the survival of Mrs. Chater at that time, for both the clause "if she shall then be living" and the clause "as she may in writing request" must be stricken out if the gift of principal is to be held vested and

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not conditional; that the trustee, at the end of the three-year period, was subject to three alternative instructions each of which necessarily contemplated the survival of Mrs. Chater at that time; that the trust having failed by reason of the death of the beneficiary, there being no gift over that could take effect the trust resulted to the donor; and that the gift of the dividends, being payable in the future, was contingent and lapsed on the death of Mrs. Chater. Respective counsel concede that the object of the court must be to ascertain and give effect to the intention of the donor.

The complainants base their claim to the shares of stock upon three principal contentions: (1) That the gift to Mrs. Chater was a vested one subject to be divested with a gift over to the sisters and their children only upon an event which did not occur; (2) that if there was a resulting trust it resulted to Mrs. Chater's estate; and (3) there was an implied gift to the child in the events which did happen.

The argument that the terms of the letter to Carter, the letter to Chater, the wording of the certificate of stock, and that of the receipts for the dividends, and the surrounding circumstances, all combine to indicate an intention in the mind of Mr. Hartwell to part with the stock absolutely, and to negative the possibility of his having contemplated a resulting trust in himself under the events which occurred is not convincing. Why the payment of the dividends was postponed and why no provision was made for the expected child is left to conjecture unless the theory of counsel for the respondents is to be accepted. But whatever the reason, the fact is that the gift was made in trust and the terms of the trust are to be found in the letter to Carter. That letter is not to be separated from the certificate of stock with which it was enclosed but is to be taken as though its terms were written into the certificate. A study of that part of the letter which defines the trust for Mrs. Chater leads irresistibly to the conclusion that the gift was made contingent upon her being alive on January 1, 1913. This

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is the plain meaning of the words used and is the only inference which reasonably can be drawn from the phrases "if she shall then be living," and "as she may in writing request," and the qualifying clause "unless at the end of the three years *she shall have* no child living, in which case the trustee is to hold the stock paying her the dividends *during her lifetime*." True, as contended, an effectual gift may be made through a trustee, but here there was not an absolute or immediate gift of the stock—the trustee was to hold it for a specified time and then to dispose of it according to the direction of Mrs. Chater, she being alive at that time. The terms of the trust are embodied in an informal letter but the fact that the same letter contained different provisions for other daughters of the donor is potent evidence that the language of the provision for Mrs. Chater was used advisedly. It is argued that the word "if" does not always denote a condition or contingency, and cases are cited applying the rule that in a will the word "if" may be construed as "when" in order to advance the apparent intent of the testator. 21 Cyc. 1725. The cases cited are not in point. There is no reason for supposing, in the case at bar, that construing "if" in the phrase "if she shall then be living" as "when" would accord with the intent of the donor. The word "when" would be an obvious misfit in that phrase, and had it been used it would doubtless have been necessary to construe it as "if" to conform to the intent as shown by the context. In short, we have found no good reason why the language of the letter should not be given its plain and ordinary meaning.

In support of their contention on the second ground counsel for the complainants invoke the well established doctrine that where one buys property in the name of another and pays the consideration money the property will generally be held by the grantee in trust for the one who paid the consideration, but that where the conveyance is taken in the name of the wife or child of the purchaser the presumption is in favor of a gift or advancement and against a resulting trust. We are of the

opinion that the doctrine has no application to a case such as this. In the classification of resulting trusts as made by text writers the case at bar would be put in another class. "Resulting trusts may arise in several ways, and may be conveniently divided into the following classes: (1) Where a purchaser pays the purchase money, but takes the title in the name of another; (2) where a trustee or other fiduciary buys property in his own name, but with trust funds; (3) where the trusts of a conveyance are not declared, or are only partially declared, or fail; and (4) where a conveyance is made without any consideration, and it appears from circumstances that the grantee was not intended to take beneficially." Bispham's *Principles of Equity* (3d ed.), 118. See also 1 Perry on Trusts, Sec. 125. "All true resulting trusts may be reduced to two general types: 1. Where there is a gift to A, but the intention appears, from the terms of the instrument, that the legal and beneficial estates are to be separated, and that he is either to enjoy no beneficial interest or only a part of it. In order that a case of this kind may arise, there must be a true gift so far as the immediate transferee A is concerned, and no valid complete trust must be declared in favor of A or any other person. Such trusts, therefore, generally arise from wills, although they may arise from deeds. If the conveyance be by a deed, the trust will result to the grantor; if it be by a will, the trust will result to the testator's residuary devisees or legatees, or to his heirs or personal representatives, according to the nature of the property and of the dispositions. 2. The second type includes the cases where a purchase has been made, and the legal estate is conveyed or transferred to A, but the purchase price is paid by B." Pomeroy's *Equity Jurisprudence* (3d ed.) Sec. 1031. The case at bar falls within Bispham's third division and Pomeroy's first. The latter author, subdividing his first type, says, at section 1034, "A second subdivision includes those cases where the owner of both the legal and the equitable estates conveys the legal estate, but does not convey the equitable estate, or

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conveys only a portion of it, and a trust in the entire equitable estate in the one instance, or in the part of it undisposed of in the other, will, in general, result to the grantor, or to the heirs or representatives of the testator." And in *Hill on Trustees* (4th Am. ed.), 179, it is said that "There is no equitable principle more firmly established than that, where a voluntary disposition of property by deed or will is made to a person as trustee, and the trust is not declared at all; or is ineffectually declared; or does not extend to the whole interest given to the trustee; or it fails either wholly or in part by lapse or otherwise; the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself or for his heir at law or next of kin, according to the nature of the estate." See *King v. Mitchell*, 8 Pet. 326; *Bond v. Moore*, 90 N. C. 239; *Skellenger v. Skellenger*, 32 N. J. E. 659. We hold that there was no resulting trust to Mrs. Chater's heirs, but that the trust resulted to Mr. Hartwell unless there was an implied gift to Mrs. Chater's child.

In connection with the third ground, counsel for the complainants urge that the clause "unless at the end of three years she shall have no child living" necessarily leads to the conclusion that if there was a child living it took. The doctrine of gifts by implication is well established in the law of wills, and counsel argue that as in the interpretation of deeds the object is equally to ascertain the intention of the parties (*Simerson v. Simerson*, 20 Haw. 57; *Nahaolelua v. Heen*, id. 372) the rule is applicable to deeds and to instruments creating trusts such as the one in hand. Elphinstone, in his *Interpretation of Deeds* (p. 286) says, "An estate by implication of law has place only by way of use, either by assurances operating under the statute or through the medium of a conveyance to serve the uses, and in devises. By the rules of the common law applicable to deeds, no intention will be presumed unless it is expressed; and consequently no estate will arise unless there be a limitation to pass that estate." See *Dudley v. Mallery*, 4 Ga. 52, 64. "Es-

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tates by implication are not favored. * * * Courts go much further in stretching the language of a will than of a deed in order to give effect to the intention." *Kellett v. Sumner*, 15 Haw. 76, 97. Assuming that the rule is applicable to conveyances creating trusts operating *inter vivos*, we think that the intention to make a gift by implication would be less readily found in such an instrument than in a will where it would be supported by the presumption against intestacy. And in construing wills, even, the probability that the testator intended to make the devise or bequest implied must be so strong that a contrary intention could not reasonably be imputed to him. 40 Cyc. 1390; 1 Underhill on Wills, Sec. 463. "If a reading of the whole will produces a conviction that the *testator must necessarily have intended* an interest to be given which is not bequeathed by express and formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." *Metcalf v. Framingham Parish*, 128 Mass. 370, 374, quoted with approval in *Robison v. Portland Orphan Asylum*, 123 U. S. 702, 707. Where a partial or incomplete trust is created by an instrument other than a will the donor being alive is in a position to make supplementary provisions to take effect during his lifetime, or by will to take effect upon his death. It appears here that the birth of a child to the primary object of his bounty was anticipated by the donor and evidently was in his mind when he penned the terms of the trust. The language of the trust instrument must be read with a view to the circumstances under which it was written. The letter was written with the fact in mind that a child was actually in gestation with the probability that in due course it would come into being. Yet, although contingent provision was made in the same instrument for the children of other daughters, there was no provision for any child of Mrs. Chater. The natural inference to be drawn is that provision for the expected child was

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intentionally omitted. Under these circumstances the court is not permitted to find that there was a gift by implication.

The contention as to the dividends is that the provision was in terms a present gift; that it was a completed gift to Mrs. Chater—not a mere direction to pay at a future time; that it vested immediately; and that the right to the dividends for three years passed to Mrs. Chater's administrator. Counsel for the respondents think that because the trust as to the shares failed by reason of the death of Mrs. Chater, the gift of the dividends fell with it, and that it was improbable that Mr. Hartwell intended that the income should be paid to Mrs. Chater's administrator after her death and after the gift of the principal had lapsed. No authority exactly in point has been found. Most of the cases cited in the briefs are of testamentary dispositions. The provision contained in the letter was neither for a legacy nor an annuity. Here again it is a matter of ascertaining from the trust instrument and the surrounding circumstances the intention of the donor. It is clear that Mrs. Chater was the chief object of the bounty. If she had lived and had a child at the end of the three-year period the shares with the right to the dividends thereon would have been hers absolutely. There was no provision for the child whose birth was expected, nor for any children that might have been born to Mrs. Chater after January 1, 1913, had she lived. The direction as to the dividends was in general terms and no words of limitation were used. Payment was not to begin at once. We do not agree with the circuit judge that the failure to make the dividends payable at once was an oversight, nor do we think that the fact that the dividends for the months from April to August were sent to Mrs. Chater affects the construction to be given the terms of the letter. There is an absence of any satisfactory evidence of an intention that in the event of the death of Mrs. Chater the dividends should be paid to her estate. In case of doubt the interest should be held to be vested rather than contingent but we think upon the whole that it sufficiently appears that the gift was

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intended to be solely to Mrs. Chater personally, was contingent upon her being alive at the time the direction to pay was to take effect, and lapsed by reason of her death before that time.

The decree appealed from is affirmed.

D. L. Withington and *A. L. Castle* (*Castle & Withington* on the brief) for complainants.

R. B. Anderson (*Frear, Prosser, Anderson & Marx* on the brief) for respondents.

FRED HARRISON v. ROBERT WYLLIE DAVIS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 16, 1914.

DECIDED MARCH 6, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—*admissions in pleadings in another suit.*

The allegations in a pleading in one suit, while open to explanation or rebuttal, are receivable as against the party in a subsequent suit as his solemn admission of the truth of the facts so alleged.

QUIETING TITLE—*admission in pleadings in another suit as proof of title.*

Upon the trial in a statutory action to quiet title the defendant's admission in a pleading in another suit of the truth of the fact that at a time stated the title was in a person from whom the defendant then claimed and from whom the plaintiff also claims in the action on trial constitutes evidence, available to the present plaintiff, of the fact mentioned and is *prima facie* proof of that fact.

TRUSTS—*statute of uses—trust to protect estate.*

If the purpose of a trust is to protect the estate for a given time or until the death of some one, the operation of the statute of uses is excluded and the trusts or uses remain mere equitable estates.

TRUSTS—*ratification of lease by trustee—waiver of right to occupy trust property.*

Where land is conveyed in trust to pay the rents, issues and profits to D during his life "or in the discretion" of D "to permit him to reside upon" the land "and while so residing to use the same for grazing or agricultural purposes", ratification by D of

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a lease by the trustee to another operates as a waiver of D's right to reside upon and use the land in the manner mentioned.

OPINION OF THE COURT BY PERRY, J.

This is a statutory action to quiet the title to a certain tract of land known as "Mokapu" and situate in the district of Koolaupoko on this island. The plaintiff claims an undivided one-half interest under a lease for a term of twenty-five years from June 1, 1910. At the trial he adduced evidence tending to show the following facts: that on August 16, 1892, John K. Sumner conveyed the land in question to Bruce Cartwright in trust "in the first place to pay the rents, issues and profits arising therefrom or thereout so long as the lease now in existence is in force" to the grantor "and upon the expiration of the present lease or other sooner determination thereof to pay the rents, issues and profits arising from or out of said land" to the grantor's nephew Robert Wyllie Davis, the present defendant, "during the term of his natural life or in the discretion of the said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes; and in the second place from and after the death of the said Robert Wyllie Davis to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten and failing such heirs of his body, then to the wife if living of the said Robert W. Davis, and failing such wife, then to convey the said premises unto the heirs at law of the said Robert W. Davis share and share alike"; that Cartwright resigned as trustee and that John D. Holt Jr., was on August 29, 1902, appointed as his successor by a court of equity; that on June 1, 1910, Holt as trustee executed a lease of the property to A. V. Gear for 25 years from June 1, 1910, the lessor consenting that the lessee should "have peaceable and quiet possession of said land during said term"; that not later than August 4, 1910, the defendant signed and acknowledged the following statement, apparently as a part of

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the same transaction, and in any event relating to the lease just mentioned: "Know all men by these presents, that I, Robert Wyllie Davis of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned Deed of Trust"; that on June 16, 1910, A. V. Gear executed an assignment to defendant of an undivided one-half interest in the Holt lease and in the premises thereby demised, the instrument of assignment not appearing, however, to have been signed by defendant; that A. V. Gear's remaining undivided one-half interest in the lease and in the demised premises passed by successive assignments to C. A. Peterson and to Addie B. Gear and finally, on October 21, 1910, to the plaintiff.

At the conclusion of the plaintiff's case the defendant moved for a non-suit on the following grounds: "(1) that the evidence of the plaintiff showed affirmatively that there was a lease outstanding when the lease to Gear, under which plaintiff claimed, was made by Holt, Trustee; (2) that plaintiff had failed to deraign his title from the government; (3) that the Statute of Uses had executed the trust, and that the defendant was the owner of a life interest in the property, and that therefore the lease to Holt, Trustee, was invalid; (4) that the plaintiff had failed to show, nor is there any evidence tending to show that the plaintiff is entitled to an undivided half for a term of years until June, 1935, of the land of Mokapu as set forth in Paragraph 1 of the Complaint; (5) that the plaintiff has failed to show and there is no evidence either competent or otherwise tending to show that plaintiff had any interest in the land known as Mokapu aforesaid". The motion was granted on the first and second grounds. Plaintiff excepts. The grounds of the motion will be considered in their order.

1. The deed of trust introduced in evidence by the plaintiff

did tend to show that at the date of its execution a lease of Mokapu was outstanding. That lease, undoubtedly, while in force would be effective as against any lease executed by the trustee. Assuming that from the mere fact of the existence of the earlier lease a presumption could be indulged in of the continuance of that lease in force until the contrary was shown, that presumption was sufficiently overcome, *prima facie*, by the plaintiff. He introduced in evidence the answer filed by this same defendant in July, 1912, in a partition suit in which the present plaintiff was in interest the real party plaintiff. In that answer the defendant, after reciting the Sumner deed of trust, alleged that "pursuant to said trust deed, with the permission of the grantee therein named, this respondent on said last named day" (August 16, 1892) "went into possession of said premises to reside thereon and use the same for grazing and agricultural purposes and ever since has been in possession thereof and residing thereon and using the same for grazing and agricultural purposes." This constituted an admission on the defendant's part that as early as August 16, 1892, the lease referred to in the deed of trust ceased in some manner to exist. Without a determination of that lease, the defendant could not, whether with or without the trustee's "permission", have exercised the discretion vested in him by the trust deed to reside upon the land, take possession of it and use it for grazing or agricultural purposes. This admission was competent evidence of the determination of the earlier lease and until rebutted is sufficient to sustain plaintiff's case upon the point.

2. Ordinarily, upon an issue of title, the plaintiff introduces evidence to prove that his title was in its inception derived from the government and thence passed to him by mesne conveyances, devise, descent or adverse possession. In the case at bar there was no evidence tending to show how the title passed from the government to Sumner. The plaintiff's claim is that it was not necessary for him to deraign title from the government, because by the introduction of this defendant's answer, already referred

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to, in the suit for partition, he had shown that both parties to the litigation claimed title from the same source, that is, from the Sumner deed of trust. The defendant, on the other hand, calls attention to the fact that neither in his answer nor otherwise in the case at bar has he disclosed from what source he now claims title and that therefore the rule invoked by the plaintiff is inapplicable. It is doubtless well established that, as it has been variously stated, "when it appears in an action of ejectment that both parties claim title from the same grantor neither can take advantage of alleged defects in the chain of title prior to the common source" (*McCandless v. Plantation Co.*, 19 Haw. 239); "if both parties claim title from the same source, neither is at liberty to deny that such person had title" (*Gaines v. New Orleans*, 6 Wall. 642, 715); "a party is estopped from denying a title under which he claims to derive his own right to the premises" (*Carson v. Dundas*, 39 Neb. 503, 510). In the cases in which this rule is enforced in its entirety, the defendant has asserted, in the very action in which title is being tried, his claim to the title solely as coming from the common source. The rule itself is simply an application of the principle of estoppel. In the case at bar the defendant has not yet disclosed from what source he claims to derive title. The mere fact that in the suit for partition he pleaded a title derived from Sumner does not estop him from setting up, if he can, a title superior in its origin to Sumner's. All that was required of him in the suit for partition, in order to obtain a trial at law, was to show that he disputed in good faith the plaintiff's claim of title. He may now continue in equal good faith, to dispute the title, even though he sets up a claim of a different or superior title. The rule of estoppel does not apply and proof that Sumner had title was therefore necessary. A *prima facie* showing of that fact was made, however, by the plaintiff by the introduction in evidence of the defendant's answer in the partition suit. In that document, signed by the defendant personally,

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he alleged that on "the 16th day of August, 1892, one John K. Sumner, for a good and valuable consideration, by indenture of deed of even date" (further describing it) "did grant, bargain and sell unto one Bruce Cartwright, his heirs and assigns forever, said piece or parcel of land called and known as 'Mokapu', in trust", setting forth the same trusts above recited. The allegations in a pleading in one suit, while open to explanation or rebuttal, are receivable against the party in a subsequent suit as his solemn admission of the truth of the facts so alleged. 11 A. & E. Ency. L. 449; 1 Greenleaf, Ev., §212; *Blanks v. Klein*, 53 Fed. 436, 438. The allegation just quoted from the answer in partition was a solemn admission by defendant of the truth of the fact that Sumner did by the trust deed convey to the trustee the title to Mokapu and therefore, by necessary inference, of the further fact that immediately prior to the execution of the deed the title was in Sumner. The defendant may, if he can, explain or rebut his admission, but until he does so it stands as a *prima facie* showing of title in Sumner at the time mentioned. See *Anderson v. Reid*, 10 App. Cs., D. C. 426, 429; *Smith v. Lindsey*, 89 Mo. 76, 79, 80; *Bonds v. Smith*, 106 N. C. 553, 565; *Brown v. Brown*, 45 Mo. 412, 415; 2 Greenleaf, Ev., §307. It may be added that in some of the decisions on the subject there is, perhaps, an inexactness of statement, resulting in an apparent confusion of the rule, on the one hand, that evidence of title back of the common source is not necessary when both parties at the trial claim solely from the common source and when, therefore, each is estopped to deny that the title was in the common source and of the principle, on the other hand, that a defendant's solemn admission in a pleading in another suit of the truth of the fact that the title was in the so-called common source constitutes evidence, available to his adversary, of that fact; but none of them, as far as we are aware, can be properly regarded as authorities against the view here adopted.

3. Under the third ground of the motion for a non-suit

the defendant's contention is that "the trust as to the life estate to Davis is a mere passive one and the use must be considered as executed"; that "an absolute life estate vested" in Davis and that "hence the lease to Gear was a nullity, the legal and equitable estate was merged in Davis and Holt had no title and could give no title". It is settled in this jurisdiction that to the application of the statute of uses "there are certain well defined exceptions or rather rules of construction which limit the effect of the statute", that special or active trusts were never within the purview of the statute and that "if the purpose of the trust is to protect the estate for a given time or until the death of some one, * * * the operation of the statute is excluded and the trusts or uses remain mere equitable estates". *Estate of Boardman*, 5 Haw. 146, 147; *Kidwell v. Godfrey*, 14 Haw. 138, 140. The trust under consideration was, after the termination of the lease referred to in the deed, to pay the rents, issues and profits to Davis for life or in the discretion of Davis to permit him to reside upon the land and while so residing to use it for grazing or agricultural purposes. The right was not granted to Davis to use the land directly for the remainder of his life, but only during the period or periods when he might see fit to reside on it; nor was the right given him even during these periods of residence to use the land for any and all legitimate purposes. Both the time and the manner of the use were restricted. It is obvious that one of the purposes of the trust was to protect the estate even as against Davis himself at least until the death of Davis, and thereafter to convey the remainder to those entitled under the terms of the instrument. Even as to the interests of Davis, this was not a mere passive trust. The trustee had active duties to perform for the protection of the property and the trust as to Davis is not within the operation of the statute.

4 and 5. In the light of the rulings above made the plaintiff made a *prima facie* showing of ownership of at least an undivided one-half interest in the lease from Holt. It need only be added

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that the possibility of the Holt lease being inoperative by reason of an exercise by Davis of his right to reside on the property and to use it for grazing or agricultural purposes was excluded, *prima facie*, by plaintiff's proof that Davis executed the document already referred to whereby he consented to the lease and ratified and confirmed it. Whatever other legal effects may be attributable to that document, it was operative at least as a waiver by Davis of his right to reside upon and so use the property.

The exceptions are sustained, the judgment set aside and the cause remanded with directions to deny the motion for a nonsuit and to take such further proceedings, not inconsistent with this opinion, as may be appropriate.

W. B. Lymer (Thompson, Wilder, Watson & Lymer on the brief) for plaintiff.

E. C. Peters for defendant..

CONCURRING OPINION OF ROBERTSON, C.J.

I concur in the opinion of the majority of the court but desire to place my concurrence on the second point upon a different ground. In an action of ejectment or to quiet title to land it is incumbent on the plaintiff to prove title and he ordinarily does that by deraigning the title from its origin. But where there is a subsequent common source from which both plaintiff and defendant claim title to the premises in dispute the state of the title anterior to that source is immaterial since though it be defective the defendant would be estopped from taking any advantage of the defect. The fact that the parties claim title from a common source may be made to appear by stipulation as in the case of *Nahaolelua v. Heen*, 20 Haw. 613, or by evidence adduced by the defendant as in the case of *McCandless v. Honolulu Plant. Co.*, 19 Haw. 239. In the case at bar there was no stipulation between the parties, but counsel for the plaintiff contend that the plaintiff could and did show *prima facie* that he and the defendant do claim from a

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common source, namely, the deed from Sumner to Cartwright. I think that this contention is correct. The cases of *Anderson v. Reid*, *Smith v. Lindsey* and *Bonds v. Smith*, cited in the majority opinion, show that the plaintiff in a case of this kind, instead of tracing his title back to its original source, may show that there is an intermediate common source of claim and then trace his title down from that source, as was done here. The following cases are to the same effect. *Mobley v. Griffin*, 104 N. C. 112, 115; *Laidley v. Land Co.*, 30 W. Va. 505, 509; *Finch v. Ullman*, 105 Mo. 255; *Mitchell v. Cleveland*, 57 S. E. (S. C.) 33. In *Holbrook v. Brenner*, 31 Ill. 501, 511, the court said, "When it is found that the defendant has purchased by deed, and is in possession of the premises, it is *prima facie* evidence that he claims under that title. And if he and plaintiff claim from the same source, it is not necessary for the latter to trace his title further in the first instance. When he exhibits a title from the same source better than that of the defendant, it is sufficient to put him upon his defense." And in *Millis v. Roof*, 121 Ind. 360, 363, it was held that "If the defendant asserts any other or superior title, or a title adverse to that under which plaintiff claims, it lies upon him to bring it forward." See also 2 Greenleaf, Ev. Sec. 307.

The statement contained in the answer of the defendant in the partition suit that he entered and took possession of the land pursuant to the trust deed to Cartwright was evidence that the deed is the source of title under which he claims as well as being the source of the plaintiff's claim. In other words, a common source of title was shown. The defendant may, if he can, show in defense that his title from the common source is as good or better than that of the plaintiff, or that he has and claims under another and superior title. But when the plaintiff rested he had made out a *prima facie* case, and the non-suit should not have been granted.

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R. E. BOND v. HAWAIIAN GAZETTE COMPANY,
LIMITED, AN HAWAIIAN CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 4, 1914.

DECIDED MARCH 13, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

JUDGMENT—*opening default*.

An order of default should be set aside and defendant permitted, upon reasonable terms, to defend, when he has made application therefor immediately after expiration of the time to answer and when he shows a defense on the merits, a reasonable excuse for his failure to answer and the absence of prejudice to plaintiff.

OPINION OF THE COURT BY PERRY, J.

This is an action for \$25,000 damages for the publication of an alleged libellous article in a newspaper printed and published by the defendant. The declaration was filed and the summons issued and served on October 13, 1913. On November 1, within the twenty days named in the summons for appearance, the defendant filed a motion to strike out the whole of the second count of the declaration on the ground that it was "a substantial reiteration of the matters alleged in the first count". The motion having been in the meantime argued and denied, the defendant on November 4 filed a demurrer, which was overruled on January 7, 1914, the same order providing that the defendant have "up to and including the 17th day of January, 1914, in which to answer or otherwise plead." On the day following the defendant filed a motion that the plaintiff be required to file a bill of particulars intended to render the allegations of the declaration more specific in certain respects in the motion named at length. The motion was based upon the ground that "the defendant cannot intelligently and reasonably prepare its defense without the information sought" and was accompanied by notice that it would be heard on January 13. At the request of counsel for the plaintiff hearing of the motion

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was continued until the 17th. On the day last named counsel for defendant, being engaged in another court, requested, with the consent of plaintiff's attorneys, that the hearing be further continued until the 19th, but for the convenience of the court the matter was ordered continued until the 24th. On the 19th, upon application of plaintiff based upon the fact that the defendant had not filed an answer or other pleading, the court made an order declaring that the defendant was in default. On the following day the defendant filed a motion to open and set aside the default, upon the grounds, among others, that the order was improvidently made during the pendency of the motion for a bill of particulars and that the failure to answer was due to "inadvertence and excusable neglect." The motion to reopen was denied and an interlocutory exception to the ruling and order was taken and allowed.

The effect of the order declaring the defendant in default was, while the defendant is still privileged to cross-examine plaintiff's witnesses and to address the jury in mitigation of damages, to debar it from the right to answer or to adduce other evidence in its defense. R. L., §§1730, 1731. The statute, however, provides that "the court or judge shall have power * * * to open the default, in their discretion, for good and sufficient reasons." R. L. §1730. To justify the opening of a default, the applicant must show a sufficient excuse for being in default and also that he had a good and meritorious defense to the action.

Referring to the second point first, it is insufficient to state in support of the application that the party "has a good and meritorious defense" without setting out what it is so that the court can judge whether it is meritorious". *Ayers v. Mahuka*, 9 Haw. 377, 379. The affidavits must disclose the facts relied upon in defense. *Ib.* 379. These requirements were sufficiently complied with in the case at bar. In an affidavit by a member of the firm of Andrews & Quarles it is deposed that "the defendant in this case employed the firm of Andrews &

Quarles to represent it"; that affiant "has fully investigated the facts, circumstances and evidence in this cause and obtained all of the information within the possession of the agents and officers of the defendant corporation, has conversed with witnesses and that in his opinion the defendant has a good and meritorious defense to the plaintiff's said cause of action based upon the evidence in said cause, sustaining, in the opinion of affiant, the following facts: That the said publication was made by the defendant in good faith as a matter of public news and upon information received by it which its officers and agents believed to be reliable; that the facts set forth in said alleged libelous publication touching the cashing of said certified check mentioned therein by the plaintiff was true and that such check was cashed by him under the circumstances mentioned in said publication; that said Garcia, mentioned therein, and the plaintiff had an altercation about the same and that the facts mentioned in said alleged libelous publication as to the threats of the said Murphy to have the plaintiff arrested are true and that the said alleged publication did not intentionally misrepresent the plaintiff in any particular and did substantially state the case truthfully and that said publication was made without malice." It is conceded, and is clear, that the facts thus offered to be proved would constitute a good defense in mitigation of damages. The objection that the affidavit is insufficient because it is not made by an officer of the defendant corporation or by its reporter or other employee or agent who wrote the article claimed to be libellous, is not sustained. Upon an application like that under consideration it is not necessary to detail the evidence claimed to support the defense or to present the affidavits of the very witnesses who will, if permitted, give the evidence. It is sufficient to show by any credible evidence that a *bona fide* defense exists and what the facts relied upon are in order that the court may determine for itself that they constitute a good defense in law. The affidavit of Mr. Quarles, a sworn officer of this court, satisfies these requirements.

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In the affidavit in support of the motion it is further set forth that the defendant "has at all times been ready and willing to plead to the plaintiff's declaration herein, but has for the reasons stated in said motion for a bill of particulars and in the affidavit in support thereof been unable to fully answer the said declaration with justice to the defendant and its defense until the said motion for a bill of particulars should have been passed upon, and that counsel has been diligent therein, even to the extent of partly preparing an answer long before the said demurrer had been passed upon, and finding in the preparation of said answer that without certain particulars called for in said motion for a bill of particulars counsel was unable to prepare the said answer in such manner as it should be prepared." The facts are undisputed. It is clear that the defendant has a good and meritorious defense in mitigation of damages, that it has been diligent at every former stage of the proceedings and that its attorneys believed that they could not with justice to their client's rights prepare its answer without first obtaining the information asked for in the motion for a bill of particulars and further believed that until the latter motion was disposed of their client would not be in default. At most they were guilty of neglect in not ascertaining by further study the true effect of such a motion in this jurisdiction. Within twenty-four hours after the default was entered, and within three days of the expiration of the time named on January 7 for the filing of an answer, and before plaintiff suffered any prejudice whatever by reason of the delay, application was made for the opening of the default and for leave to answer. Is the mistake (assuming that it was a mistake of law) or the neglect of counsel a sufficient reason for opening the default? On this point but little aid is to be derived from decided cases. In some of them where so-called mistakes were relied upon, there was no meritorious defense or good faith was otherwise found to be lacking; in others the degree of neglect and the surrounding circumstances were different; in many the application to reopen was

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made *after* judgment; and in still others the decisions were affected by statutory provisions granting to the court, for example, power to "relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect", such provisions on the one hand making clear the mistake and inadvertence were good grounds for relief and on the other excluding by the very enumeration all other possible grounds.

Our statute is broad. "Good and sufficient reasons" is all that it requires to justify the exercise of the discretion of the court in favor of the party in default. The discretion referred to, it need scarcely be said, is not to be arbitrary or capricious but judicial and should be exercised in accordance with the peculiar circumstances of each case. It has been correctly said that "as a general rule, in cases where", as here, "the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve" and that "the exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a judgment on the very merits of the case" (*Watson v. R. R. Co.*, 41 Cal. 17, 20); and that "it should be the policy of courts to try causes on their merits whenever such course will not result in hurtful delay" (*Tucker v. Ins. Co.*, 63 Mo. 588, 593). See also *Walsh v. Boyle*, 94 Minn. 437. It is not a sufficient answer to an application to open, that the party was legally in default at the time the order was entered. Our statute clearly contemplates that even in such cases the court shall have power, for the furtherance of substantial justice, to deprive the party at whose instance the order was entered of the technical advantage thereby gained. It contemplates that if there is a meritorious defense the presentation of which is essential to the promotion of justice, a full and fair trial shall be permitted, provided a reasonable excuse exists for the default.

In the case at bar there is a reasonable excuse. If counsel

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misunderstood the legal effect of the pendency of the motion for a bill of particulars, they erred in good faith. There is no room for a finding to the contrary. Attorneys are human and may err. They were prompt in their efforts to secure a re-opening of the case and permitted no prejudice to result to plaintiff from their mistake or neglect. They had sought no unnecessary delays in the cause and, like the defendant itself, were ready and anxious at all times to present their meritorious defense. Under these circumstances, all undisputed, the promotion of justice permits of but one course and that is the opening of the default. The exclusion of the defendant from the right to answer and to present its evidence may result in plaintiff's obtaining a judgment for an amount of damages much larger than any he could recover upon a full trial. "There never should be an objection to a fair trial upon the merits to those who are reasonably diligent." *Westphal, Hinds & Co. v. Clark*, 46 Ia. 262, 264. If plaintiff has a good case he will recover in spite of the full presentation of defendant's defense. On the other hand, if he has a bad one, the court "ought not to be very anxious to help him keep an advantage he has obtained, not through the justice or strength of his cause, but by the accidental blunder of his opponent" or its attorneys. *Howe v. Coldren*, 4 Nev. 171, 175. In our opinion the refusal to open the default was an abuse of discretion.

The exception is sustained, the order excepted to set aside and the cause remanded with directions to open the default upon reasonable terms and to permit the defendant to answer within a reasonable time to be fixed by the trial court and for such further proceedings as may be proper.

C. H. Olson and I. M. Stainback (Holmes, Stanley & Olson on the brief) for plaintiff.

L. Andrews (Andrews & Quarles on the brief) for defendant.

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GEORGE E. WARD *v.* INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, AN HAWAIIAN CORPORATION.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 20, 1914.

DECIDED MARCH 17, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MASTER AND SERVANT—*defective appliance—injury—proximate cause.*

The defendant having negligently continued the use of a defective cable on its coal conveyor which, by reason of its defective condition, came off certain pulleys designed to hold it in position, and the plaintiff, an employee of the defendant on the conveyor, in attempting to restore the cable to its proper position was injured. The question, whether the proximate cause of the plaintiff's injury was the negligence of the defendant in failing to furnish a reasonably safe cable for use, is not a question of science or legal knowledge, but a question of fact for determination by a jury.

OPINION OF THE COURT BY DE BOLT, J.

(Perry, J., Dissenting.)

This is a writ of error to review a judgment of nonsuit entered in the circuit court of the first circuit,—the sole assignment of error being the granting of the motion for nonsuit and entry of judgment thereon. The record sent up in response to the writ shows that George E. Ward, the plaintiff in error, hereinafter called the plaintiff, brought an action against the Inter-Island Steam Navigation Company, Limited, the defendant in error, hereinafter called the defendant, to recover damages in the sum of \$50,000 for personal injuries sustained by him on July 8, 1912, as the result of the alleged negligence of the defendant while the relation of master and servant existed between them.

On and prior to the date of the accident which occasioned the injury to the plaintiff complained of in his action, the defendant, as a part of its business, maintained and operated in Ho-

nolulu a coal conveyor used for the purpose of unloading coal from ships made fast to the wharf on which the conveyor was constructed. The conveyor consisted of an elevated double-track railway, circular at each end, about twenty-five feet in height above the wharf, and upon which railway coal cars were moved by an endless steel cable about 2800 feet in length operated by an engine and drum situated under the conveyor on the wharf. The cable was held in position at the circular ends and curves of the railway by pulleys. Near the engine house a weighted box was suspended on the cable for the purpose of keeping it taut when in use, which could be raised or lowered by block and tackle.

At the time of the accident the plaintiff had been in the employment of the defendant about eight years as machinist in its shops and as foreman at the coal conveyor, occasionally going to sea as engineer on one of the defendant's boats.

While the plaintiff was engaged at the conveyor as foreman his chief work was on the ships superintending the discharging of coal, but his duties also required him to go upon the conveyor, see that everything was in order, and to attend to the general working thereof.

In the view we take of the case it will not be necessary to enter into a detailed statement or analysis of the evidence. Suffice it to say, that the evidence adduced by the plaintiff tended to show that at the time of the accident and for a period of about three weeks prior thereto, the steel cable then in use on the coal conveyor was roughened by usage, small strands of wire about 1-16 of an inch in length projecting; that this roughness of the cable gave it a tendency when in motion to climb on the pulleys and hence a greater tendency to come off; that by reason of its condition it did come off the pulleys; that it was in a dangerous and unsafe condition; that it was unfit for the use and purpose required of it; that it had been in use about ten months; that the life of a cable such as the one in question was about eight months; that the defendant had notice, as well as

actual knowledge, of the condition of the cable and promised the plaintiff that a new cable would be put in; that the plaintiff relying upon the promise of the defendant to put in a new cable continued in the performance of his duties; that on the day of the accident, while the plaintiff was engaged in the performance of his duties on a ship discharging coal, the cable came off the mauka four of the mauka series of eight pulleys, of which fact he was informed; that he immediately proceeded to the conveyor, in the meantime the engine, which propelled the cable, was stopped and the cable brought to rest; that upon reaching the place where the cable was off, the plaintiff, with the assistance of others, endeavored to replace it by using crowbars to pry it back into position, when, suddenly, the cable came off the remaining pulleys of this series, struck him with great force and hurled him to the wharf below, a distance of about twenty-five feet, whereby he sustained serious and permanent injuries.

We will assume for the purposes of this opinion that the evidence adduced by the plaintiff showed that the defendant was guilty of negligence in furnishing a defective cable for use on its coal conveyor.

At the close of the plaintiff's case the defendant moved for a nonsuit on the following grounds: (1) That the plaintiff had failed to show that the defendant was guilty of any negligence; (2) that the proximate cause of the accident was the plaintiff's own act; (3) that the plaintiff was guilty of contributory negligence; (4) that the plaintiff assumed all the risk of the employment which resulted in the accident.

While the court below was of the opinion that the evidence adduced tended to show that the cable was defective, it held, however, that there was no evidence tending to show that the slipping of the cable from the pulleys at the time the plaintiff was endeavoring to restore it to its proper position was the result of the defective condition of the cable, and, therefore, granted the motion on the first ground. As to the second, third and fourth grounds of the motion, the court held, and we think cor-

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rectly, that they presented questions of fact for determination by a jury. As to the act of the plaintiff in attempting to replace the cable in the manner disclosed by the record, neither the court below nor can this court, as a matter of law, say that he was guilty of contributory negligence. The state of the evidence was such that different minds might honestly draw different conclusions from it, the questions thus presented being questions of fact clearly within the province of a jury to determine. *Neeley v. Southwestern Cotton Seed Oil Co.*, 64 L. R. A. 145, 151; *McGrath v. Texas & P. Ry Co.*, 60 Fed. 555; *George v. Clark*, 85 Fed. 608.

The defendant contends that the defective condition of the cable was not the proximate cause of the plaintiff's injury, because, after it came off the pulleys and was at rest, its defective condition ceased to operate or have anything to do with the events which followed, admitting, however, that when it came off the pulleys while in motion, if it had then struck the plaintiff and injured him, it might properly have been claimed that the defective condition was the proximate cause of the injury.

The plaintiff, of course, contends that the negligence of the defendant in continuing the use of the cable in its defective condition was the primary and proximate cause of the accident resulting in his injury, and that the defendant, therefore, is liable. Upon the evidence as disclosed by the record now before us this question as to the liability of the defendant should have been submitted to the jury. 21 Am. & Eng. Ency. Law (2d ed.), 508; 2 Labatt, Master and Servant, §805.

Actionable negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done. *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 416; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 441; 1 Thompson on Negligence, §1.

If the defendant failed to furnish the plaintiff with a cable

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reasonably safe for the use and purpose required (and the evidence tends to show that it did so fail), then it was guilty of negligence; and (as suggested by counsel for the defendant), if the cable, when it came off the pulleys while in motion, had struck the plaintiff and injured him, there could be no question as to his right to recover. The connection between the negligence and the injury would then have been direct, natural and continuous. Obviously, the negligence of the defendant would then have been the primary and proximate cause of the injury. The question now presented by the record, however, is, whether the negligence of the defendant in failing to furnish a reasonably safe cable was the proximate cause of the plaintiff's injury? In other words, was the injury the natural and probable consequence of the defective cable, and should it have been foreseen in the light of the attending circumstances? These, of course, are questions of fact, peculiarly within the province of a jury to determine.

In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 474, Mr. Justice Strong said: "The true rule is that what is the proximate cause of any injury is ordinarily a question for a jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is

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the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * *

We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. * * *

In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

It is fundamental, of course, that in an action founded upon the alleged negligence of a defendant, the negligence must be the proximate cause of the injury alleged; and it is also true, that where there is an "intermediate cause disconnected from the primary fault," such as an intervening human agency, "self-operating," which comes between the act of negligence and the injury, the negligence alleged is not the proximate cause of the injury, unless a reasonable and prudent person should have foreseen that his negligent act would set the intervening cause or human agency in motion. The crucial question, the pivotal fact, in the case at bar is, therefore, whether the

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“primary fault,” the negligence of the defendant, and the injury of the plaintiff are “naturally and probably connected with each other by a continuous sequence, or dissevered by a new and independent agency.” This is not a question of science or legal knowledge, but a question of fact for a jury to “answer in the light of all the attending circumstances, and in accordance with common sense and understanding.” 29 Cyc. 499, 500; *Watson, Damages for Personal Injuries*, §§32, 36, 58, 62, 177; *Southern R. Co. v. Webb*, 59 L. R. A. 109, 112; *City of San Antonio v. Porter*, 59 S. W. 922; *Shippers' Compress & Warehouse Co. v. Davidson*, 80 S. W. 1032; *Gudfelder v. Ry. Co.*, 207 Pa. 629; *Hampson v. Taylor*, 15 R. I. 83; *Mahogany v. Ward*, 16 R. I. 479, 483; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448, 458; *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134; *Missouri, K. & T. Ry. Co. of Texas v. Raney*, 99 S. W. 589.

In *Chicago R. I. & P. R. Co. v. Moore*, 43 L. R. A. (N. S.) 701, 706, a case analogous to the case at bar, the plaintiff was employed by the company as a fireman on one of its locomotive engines, which was sent out in a defective condition, and while out on the road got out of order. An examination disclosed that the “eccentric” was broken. It was the duty of the plaintiff to make emergency repairs while on the road. While engaged in making the repairs, the “straps,” which fastened the “eccentric” to the axle, broke and injured the plaintiff. The court said (p. 706): “But in this case the repairs, under the circumstances, were made necessary by the negligence of the company, and enhanced the risk of the injury. The intervention of the act of the plaintiff between the negligence of the company and the injury should have been anticipated. When the engine broke, it became necessary to repair. The plaintiff could not go off and leave it. It should have been foreseen that he would attempt to remedy the defect and thereby incur the risk of injury. The defendant is charged with knowledge of the defect, and knowing the defect it must have known that

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some sort of injury was likely to result. It must have known that if nothing worse happened the shaft would break, and that it would be necessary to repair it, and thereby the risk of injury would be enhanced. It is true, as argued by the defendant, the plaintiff could have gone off and left the engine, but it should have been so anticipated that he would not do so, and that he would attempt to repair it just as he did."

The case at bar is clearly distinguishable from those cases wherein the injury was the result of an independent intervening cause. *Pass Ry. Co. v. Trich*, 117 Pa. 390; *McFarlane v. The Town of Sullivan*, 99 Wis. 361; 29 Cyc. 499, 500; *Elliott v. Allegheny County Light Co.*, 204 Pa. 568; *Cole v. German Sav. & L. Soc.*, 63 L. R. A. 416.

The questions presented by the evidence in the case at bar, as disclosed by the record before us, and which should have been submitted to the jury for determination, are, in effect, whether it was the duty of the defendant to have foreseen that the cable, by reason of its defective condition, would come off the pulleys; whether the plaintiff would thereupon attempt to restore it to its proper position; and whether the injury sustained by the plaintiff was the natural and probable consequence of the defendant's negligence. In other words, whether or not the intervening cause—the human agency—was set in motion by the defendant's negligence.

The plaintiff also claims that his injuries were caused by the lack of a guard rail and platform at the head of the conveyor—the place where the accident occurred.

It appears from the record that the plaintiff was fully aware of the condition of the conveyor when he accepted employment thereon and at all times during his employment, and that he had never made any complaint concerning it. There is nothing in the evidence tending to show that he continued in his work relying upon any promise to change the condition of the conveyor in the respect mentioned. Whatever the risks were, we

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think under the circumstances disclosed by the record, the plaintiff assumed them.

The plaintiff having made out a *prima facie* case was entitled to have it submitted to the jury.

The judgment of nonsuit is reversed, a new trial is granted and the cause remanded with directions to deny the motion for nonsuit.

E. A. Douthitt (*Douthitt & Coke* on the brief) for plaintiff.

C. R. Hemenway, I. M. Stainback and W. L. Stanley (*Smith, Warren, Hemenway & Sutton and Holmes, Stanley & Olson* on the brief) for defendant.

DISSENTING OPINION OF PERRY, J.

While concurring in what is said in the foregoing opinion on the subject of the assumption by plaintiff of the risks incident to the lack of a guard rail and a platform at the head of the coal conveyor, I respectfully dissent from the view that the question of proximate cause should have been submitted to the jury and from the conclusion that a nonsuit was incorrectly ordered.

There is no doubt that what is the proximate cause of an injury is ordinarily a question for a jury; but when the facts are all undisputed and the inferences necessary to sustain the plaintiff's case are not legally deducible from those facts, the question is solely one of law for the court. *Teis v. Smuggler Mining Co.*, 158 Fed. 260, 269; *Jennings v. Davis*, 187 Fed. 703, 713; *Clark v. Wallace*, 51 Colo. 437, 439. In the case at bar the question was, in my opinion, one of law for the court.

There was, it is true, evidence tending to show that the cable in its worn and frayed condition had a "tendency to climb" on the pulleys and thus to leave them and that the defendant was therefore guilty of negligence in continuing the use of the cable; and if in leaving the pulleys for this reason the cable had caused injury to an employee without any fault of the latter, the negligence would clearly have been the proximate cause of the injury and the defendant would have been liable.

But although in the instance under consideration the cable did (always assuming, as we must, that the plaintiff's evidence was true) leave four of the pulleys in consequence of its defective condition, no one was injured thereby. That fact is beyond dispute. The cable was stopped and it was only after it was entirely at rest that the plaintiff attempted to replace it behind the pulleys and in the attempt received the injuries complained of. There is not the slightest evidence to support a finding that the defective condition of the cable contributed in any degree to its leaving the second set of four pulleys or to its slipping from the crowbars then being used to restore it to its proper place. For aught that is made to appear to the contrary by the evidence, the slipping of the cable from the second set of pulleys and its hurling of the plaintiff to the dock below may have been either a pure accident or the result of plaintiff's own negligence. The burden was upon the plaintiff to make a *prima facie* showing that the fall was caused by some negligence of the defendant and was not a mere unavoidable accident.

The proximate cause of an injury may be distant in time and in place, it may operate through successive instruments, but to be such it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that it ought to have been foreseen in the light of the attending circumstances. *R. R. v. Kellogg*, 94 U. S. 469, 474. "A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it." *Cole v. German Savings & Loan Soc.*, 124 Fed. 113, 115. In a general sense every act or event leads up to and is the cause of some subsequent act or event and, inversely, every act or event is in some degree influenced by and is the consequence of some earlier act or event. But in that broad sense causes and consequences are unknown in the law of negligence. Certainty in the law, justice and expediency require the imposition of

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narrower limits in the field of recovery and it is therefore well established that "a prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury." 29 Cyc. 496; *R. R. v. Columbia*, 65 Kan. 390, 399. In the case at bar there was no causal connection, within the meaning of the rule, between the defendant's negligence in using the defective cable and the plaintiff's injury. With the bringing of the cable to rest, the continuity in the chain of events was broken. As far as is disclosed by the evidence, either a pure accident or the plaintiff's negligence, following the plaintiff's act in attempting to replace the cable, was the proximate cause of the injury. The defendant's negligence and the consequent leaving of the first four pulleys by the cable merely furnished the condition or gave rise to the occasion by which the injury was made possible and any finding by a jury to the contrary would find no support in the evidence. So also did the defendant's employment of plaintiff, plaintiff's acceptance of that employment and defendant's erection and maintenance of the coal conveyor give rise to the occasion and yet none of these could properly be regarded as the proximate cause of the injury.

It seems to me that the jury would not be justified in declaring that plaintiff's fall was the natural and probable consequence of the continued use of the defective cable, in other words, in charging the defendant with the duty of foreseeing the fall, any more than in holding that it should have foreseen that plaintiff in hastening to the spot where the cable was off the pulleys would stumble and fall to the dock below or that the man in charge of the engine in attempting to stop the machinery and thus bring the cable to rest would have his hand caught in the machinery, requiring amputation of a part of the arm.

The plaintiff, who was a skilled engineer and machinist and

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was entirely familiar with the coal conveyor and its operation, in accepting the employment assumed its ordinary risks. *Kohn v. McNulta*, 147 U. S. 238, 241; *Tuttle v. R. R.*, 122 U. S. 189, 195, 196. As far as the evidence discloses this was one of them. It is not made to appear that the accident could not as well have happened with a non-defective cable at rest as with a defective cable at rest or, in other words, that the defective condition contributed to the accident. The burden was on the plaintiff throughout to establish a *prima facie* case.

Much reliance is placed by plaintiff upon the case of *R. R. v. Moore*, 43 L. R. A., N. S., 701, decided by the supreme court of Oklahoma. Possibly that case can be distinguished in its facts from that at bar. The engineer, whose main duty was to operate the engine on the road, was said by the court to be under a duty to repair "only in cases of emergencies such as the company by reasonable care could not provide against"; and the court in its opinion (pp. 705, 706) expressly made the reservation that, "neither could an employee regularly engaged in repairing the machinery of the company recover for an injury received as the one complained of here, however negligently the necessity for repairs might have been caused, because it was his regular business to repair and the danger in his employment was exactly the same, whether the repairs were made necessary by negligence or accident". In the case at bar the undisputed evidence is that the plaintiff was regularly engaged in repairing the machinery of the conveyor, just as he was regularly engaged in superintending its operation. It was his regular business to repair, whether the repairs were made necessary by accidents resulting from negligence or by causes not involving negligence; and the danger in his employment was exactly the same in the one class of repairs as in the other. The case at bar would seem to fall, not within the principle of the actual decision in the *Moore* case, but within the principle of the reservation. If, however, the cases are not thus distinguishable and if the court in the *Moore* case goes to the extent of holding that upon facts

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such as exist in the case at bar the defendant's negligence was the proximate cause of the injury, it does not appeal to me as sound and I respectfully decline to follow it.

In my opinion the plaintiff failed to show that the defendant was guilty of any negligence which could have been properly found by the jury to have been the proximate cause of the injuries complained of and the motion for a nonsuit was properly granted.

HAWAIIAN TRUST COMPANY, LIMITED, TRUSTEE
UNDER THE WILL OF GEORGE GALBRAITH, v.
THOMAS GALBRAITH, WILLIAM JAMES GAL-
BRAITH, ALEXANDER GIBB GALBRAITH, A
MINOR, KATHLEEN STEVENSON GALBRAITH,
A MINOR, SAMUEL CONNOR, A MINOR, HUGH
CONNOR, A MINOR, AND REBECCA CONNOR,
A MINOR.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED FEBRUARY 27, 1914.

DECIDED MARCH 17, 1914.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TRUSTS—*bill for instructions by trustee.*

The proper purpose of a bill for instructions is to secure for a trustee the directions of a court of equity to guide him in executing the trust where there are conflicting interests and there is doubt as to the proper course to pursue in administering the trust or disposing of the fund, with the view to obviating future liability or controversy.

APPEAL AND ERROR—*bill for instructions—appeal by trustee.*

Where upon a bill for instructions brought by a trustee a decree was entered instructing and directing the trustee to pay to certain persons a portion of an annuity from and after a certain date in the past and it appeared that for a period after that date the trustee had paid the entire annuity to other persons from whom the trustee would have to recover the amount overpaid or make

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it good; held, that the trustee had such an interest in the decree as would entitle it to appeal therefrom to the supreme court.

DESCENT AND DISTRIBUTION—*construction of statute—common law.*

Where a statute of descent purports to furnish a full and complete scheme for the distribution of intestate property the rules of descent of the common law are excluded.

SAME—*application of statute to given case.*

Under R. L. Sec. 2509, where the intestate is a woman who leaves neither issue nor husband nor parent, but does leave a brother, children of a deceased brother, and children of a deceased niece, the estate is to be divided between such collaterals, the children of the deceased niece taking the share which their mother would have taken had she been living.

OPINION OF THE COURT BY ROBERTSON, C.J.

By the will of the late George Galbraith Anne Jane Galbraith was given an annuity of \$150 a year, the same being payable to her and her heirs. See 18 Haw. 52. She died unmarried at Belfast, Ireland, on or about the 3rd day of December 1908, leaving surviving her neither child, parent nor grandparent, but leaving as her next of kin surviving her a brother, six nephews, four nieces and three children of a deceased niece. In the case of *Aihonua v. Ahi*, 6 Haw. 410, it was held by Chief Justice Judd, that in this jurisdiction under the statute of descent as it stood at that time the word "children" did not include the grandchildren of a deceased brother or sister, but that upon the death of an intestate leaving only a niece and a grandnephew, the niece would inherit to the exclusion of the grandnephew. In the case of *Kahananui v. Maunakea*, 20 Haw. 114, it was held, the statute having in the meantime been amended, that the word "children" included grandchildren of a deceased brother or sister so that grandnephews and grandnieces of an intestate would share in the estate with the decedent's niece.

The Hawaiian Trust Company, Limited, trustee under the Galbraith will, filed in the court below a bill for instructions reciting the foregoing facts and averring that in reliance upon the statute as construed in the first case referred to and upon

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the advice of counsel that it was a rule of property upon which the trustee could and should rely, it paid the annuity, after the death of Anne Jane Galbraith, one-half to the brother, and one-half to the surviving nephews and nieces to the exclusion of the children of the deceased niece; that one of the nephews, relying on the decision in *Aihonua v. Ahi*, had purchased the interests of certain of the other nephews and nieces, and now claims that any diminution of his interests so purchased or any recognition of the children of the deceased niece as entitled to share in the final distribution of the corpus of the estate should they survive to the period of distribution would be to deprive him of property without due process of law; that it is claimed on behalf of the children of the deceased niece that they are entitled to share in the annuity from the date of the death of said Anne Jane Galbraith, or from the date of the decision of the case of *Kahananui v. Maunakea*, or, in the alternative as to one-half of the annuity, that they are entitled to share in said one-half of the annuity from the date of the death of said Anne Jane Galbraith under the common law if the statute of descent does not govern; that these claims are disputed by the nieces and nephews; that the plaintiff is uncertain in respect to its duties as trustee under the will as to whether it should pay any portion of the annuity to the children of the deceased niece; and prayed to be instructed as to its duty in the premises. James Galbraith, brother of Anne Jane Galbraith, was not made a party to the proceeding, nor was George Galbraith, one of the nephews, nor were those who were alleged to have assigned their interests. Three nephews, a niece, and the three children of the deceased niece appeared and answered, guardians ad-litem having been appointed for those being minors.

The circuit judge held that the children of the deceased niece were entitled to take under the statute (R. L. Sec. 2509) the share which their mother would have taken had she lived, and a decree was entered instructing the trustee accordingly.

The only appeal taken and perfected from the decree is

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that of the plaintiff. Counsel for the several respondents contend that the trustee has no right to prosecute the appeal because it has no interest in the subject-matter, or at least no such interest as will authorize it to represent one set of parties to the record in opposition to the other when neither is complaining of the decree made. Counsel for the trustee argue that the plaintiff is entitled to appeal from the decree for several reasons, one of them being that it has a pecuniary interest in the decision because it requires the trustee to make good to the children of the deceased niece their share of the annuity from the date of the death of Anne Jane though the trustee had, until the case of *Kahananui v. Maunakea* was decided, distributed the annuity to the other claimants.

The proper purpose of a bill for instructions is not to obtain the judgment of the court upon the legality of a payment made or other act done, but is to secure for a trustee the directions of a court of equity to guide him in executing the trust where there are conflicting interests and there is doubt as to the proper course to pursue in administering the trust or disposing of the fund, with the view to obviating future liability for pursuing a course that might turn out to be a mistaken one. See *Bishop Trust Co. v. Oahu Sugar Co.*, 19 Haw. 183; *Bullard v. Attorney General*, 153 Mass. 249; *Clay v. Gurley*, 62 Ala. 12, 21; *Griggs v. Vekhte*, 47 N. J. E. 179, 181.

In the case at bar the effect of the decree is not merely to direct the action of the trustee for the future but to pass upon what had already been done. This, however, seems to have been brought about by the parties themselves. The decree entered in the court below was submitted by counsel for the children of the deceased niece and was approved by counsel for the other respondents. No objection to its form was made by the trustee, and it was responsive to the prayer of the bill in which the trustee asked to be instructed "whether it shall pay a proportionate share of the annuity bequeathed to Anne Jane Galbraith, as aforesaid, to said" children of the deceased niece

"either from the date of the death of said Anne Jane Galbraith or from the date of the decision of the Supreme Court of Hawaii in the case of *Kahananui v. Maunakea*." The decree "instructed, ordered and directed" the trustee to pay to the said children of the deceased niece, in equal shares, "one-twenty-second part or share of the annuity * * * from the date of the death of said Anne Jane Galbraith." The enforcement of the decree would oblige the trustee to make good to those children their portion of the annuity for the years 1908 to 1910 which had been divided among the other claimants. We think that because the amount involved is small and may be recouped by the trustee from those to whom it was paid does not affect the result. Under the circumstances we hold that the trustee has an appealable interest.

Thomas Galbraith, who, it was alleged, purchased the interests of certain of the nephews and nieces in reliance upon the decision in *Aihonua v. Ahi*, did not appeal from the decree so it will not be necessary to consider the point whether, having so purchased, it would be depriving him of property without due process of law to now hold that those interests are to be diminished in order to let in the children of the deceased niece.

Counsel for the appellant are in error in supposing that the two cases above referred to are in conflict. The earlier of the two decisions was rendered in 1883 by the trial court in an ejectment case whereas the later was decided in 1910 by the supreme court upon a writ of error. There should be no doubt as to which would be the controlling decision if they were in conflict though *Kahananui v. Maunakea* did not overrule *Aihonua v. Ahi*. In each case the statute was construed as it existed at the time of the decision. There has been no amendment of the statute since 1898. *Kahananui v. Maunakea* was well reasoned, and, under the ruling there made, if, in the case at bar, the intestate had left a husband he would have been entitled to one-half of the annuity and the surviving brother and the children of the deceased brother, including his grand-

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children, would have shared the other half. But the point here is as to who shall take in view of the fact that the intestate, being unmarried, left no husband.

Counsel for the nephews and niece contend that no provision of the statute of descent is applicable to this case; that the common law applies; and that by the common law one-half of the annuity would go to the decedent's brother and the other half to the children of the deceased brother, including their clients, but excluding his grandchildren. Counsel for the children of the deceased niece contend that effect would be given to the spirit of the statute, which was intended to furnish a complete plan for the descent of property, and no violence would be done its language, by construing it to mean that in the event of an intestate leaving only brothers and sisters and their descendants, and no husband or wife, the entire estate would go to the brothers and sisters and their descendants; that as the statute furnishes a complete scheme governing the descent of property there is no occasion for resorting to the common law; but that if the statute does not apply the entire annuity would, by the rule of the common law, go to the intestate's surviving brother to the exclusion of all these respondents.

In *Barnitz v. Casey*, 7 Cranch 456, 468, the supreme court held that where it is "perfectly clear" that the case presented is not within the statute, it "of course is a *casus omissus* to be regulated by the common law." In the later case of *Bates v. Brown*, 5 Wall. 710, 716, the court quoted from Kent's Commentaries that "In the United States the English common law of descents, in its most essential features, has been universally rejected, and each State has established a law of descents for itself." And after quoting from the statute involved in that case, which does not appear to have been any more complete than the statute of this Territory, the court said, "We find here not a trace of the common law. These provisions are diametrically opposed to all its leading maxims. We cannot infer from their silence that anything not expressed was intended to

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be adopted from that source by implication or construction." Chapter 155 of the Revised Laws purports to furnish a full and complete scheme for the distribution of intestate property both real and personal; it propounds a series of hypotheses and declares who shall take under each given state of facts; it provides in several paragraphs for children, husband, wife, parents, brothers and sisters, and the children and descendants of such, and, if there are no such relatives, for the next of kin. Under such a statute the rules of descent of the common law are excluded upon the principle that where a statute relating to a given subject covers the whole of such subject it excludes the common law upon that subject. *Cloud v. Bruce*, 61 Ind. 171, 174.

The provisions of the statute which bear directly upon the question are as follows:

"If the intestate be a woman and leave no issue, her estate shall descend one-half to her husband, and the other half to her father and mother as tenants in common, and if she leave no husband nor issue, the whole shall descend to her father and mother, or to either of them if only one be alive; if she shall leave no issue, nor father, nor mother, her estate shall descend one-half to her husband and the other half to her brothers and sisters, and to the children of any brother or sister by right of representation.

"If the intestate shall leave no issue nor father, mother, brother or sister, nor descendants of any deceased brother or sister, the estate shall descend to the intestate's widow, if any; or in case the intestate be a woman, to her husband, if any.

"If the intestate shall leave none of the said relatives surviving, nor widow nor husband, the estate shall descend in equal shares to the next of kin in equal degree, but no person shall be entitled, by right of representation to the shares of such next of kin who shall have died; provided, however, that if the estate come through either parent of the deceased intestate, the brothers and sisters of that parent and their respective heirs shall be preferred to those of the other parent." (R. L. Sec. 2509.)

Some of the reasoning in the opinion in *Kahananui v. Mau-*

nakea is applicable and it need not be repeated here. We think it a reasonable and necessary conclusion from the statute as a whole and the provisions quoted in particular that where the intestate is a female who leaves no husband, her only heirs being a brother and the descendants of a deceased brother, the common law does not apply, but that the brother and the descendants of the deceased brother will take the estate. From the provision in the final paragraph quoted that when "none" of the specified relatives are surviving the estate shall descend to the next of kin there arises a fair presumption that the legislature intended that when *some* such relatives are surviving they should take the property; and the reasonable inference to be drawn from the first paragraph quoted is that when the intestate leaves neither issue nor parents nor husband the whole estate shall go to the brothers and sisters and the children of any deceased brother or sister. The circuit judge properly held that the children of the deceased niece are entitled to the share of the annuity which their mother would have taken had she survived.

Decree affirmed.

Frear, Prosser, Anderson & Marx for complainant.

Smith, Warren, Hemenway & Sutton and *Holmes, Stanley & Olson* for respondents.

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CLINTON B. RIPLEY AND LOUIS E. DAVIS, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME OF RIPLEY AND DAVIS, v. KAPIOLANI ESTATE, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 7, 1914.

DECIDED APRIL 22, 1914.

ROBERTSON, C. J., QUARLES, J., AND CIRCUIT JUDGE DICKEY,
IN PLACE OF WATSON, J.

APPEAL AND ERROR—*witness—unanswered question.*

An exception should not be predicated upon a question propounded to a witness and objected to, when for any reason the question is not answered, the adverse party not being prejudiced.

CORPORATIONS—*agency—evidence.*

Agency, on behalf of one acting for a corporation may be established by proof of facts, and by circumstances; and, evidence showing that one asserted to be an agent for a corporation has attended to its ordinary business prior and up to the time of the act or acts involved, and performed other and similar acts for the corporation, is admissible as tending to show the relation of principal and agent between the corporation and such person.

EVIDENCE—*signature to written orders.*

Oral evidence is not admissible to prove who signed written orders where no grounds for secondary evidence have been laid, and it is not shown that it is not within the power of the party to produce such written orders.

APPEAL AND ERROR—*inadmissible evidence—harmless error.*

Where secondary evidence is improperly admitted, and there is other evidence proving the fact sought to be established by such inadmissible evidence, an exception thereto will not be sustained, the error being harmless.

SAME—*pleading and practice—verdict.*

Where the complaint contains two counts, one seeking to recover for services upon a special contract, the other upon a *quantum meruit*, and it is apparent from the record, especially from the instructions, that the jury found, without evidence to support the verdict, upon the first count, the verdict will be set aside, although

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the jury might have found for plaintiff under the second count, especially, as in this case, when unauthorized interest is included in the verdict.

OPINION OF THE COURT BY QUARLES, J.

The plaintiffs sued in assumpsit to recover for services as architects the sum of \$1080. The complaint contained two counts. In the first count plaintiffs declare upon a special contract, alleging that defendant promised and agreed to pay to plaintiffs for such services the sum of \$1080, when thereafter, requested so to do. In the second count plaintiffs seek to recover upon a *quantum meruit* for services rendered to defendant at its special instance and request of the reasonable value of \$1080, in which sum, judgment was demanded. The defendant filed a general denial. The cause was tried before the court and a jury, and a verdict rendered in favor of the plaintiffs for the sum of \$1080, with interest from May 1st, 1912, amounting to \$152. , for which, with costs, judgment was entered. The defendant moved for a new trial which was denied, and brings its exceptions, eighteen in number, to this court.

Under the view which we have taken of this case, it will not be necessary to consider each of the exceptions specially, except the last two. At least two of the exceptions are predicated upon the action of the trial court in overruling objections of the defendant to questions asked witnesses by plaintiffs, but which questions were not answered. A question asked a witness, and not answered, should not be made the basis of an exception. A number of the exceptions are predicated upon the admission of evidence tending to show that John F. Colburn, whom the plaintiffs claimed made, as agent for the defendant, the agreement under which the services alleged in the complaint were rendered, had for years prior to the rendition of the said services, been a director and treasurer of the defendant corporation, and had during such time managed the business of the defendant, bought material for it and used it in the construction of buildings, and

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repair and alteration of buildings owned by it. We think the admission of such evidence was proper as tending to show the relation of principal and agent between the defendant and the said Colburn. One of the exceptions challenges the correctness of the trial court in permitting a question to one of the witnesses to the effect that no written order for material received by the employer of the witness from the defendant was signed by any person other than the said Colburn, on the ground that the question called for secondary evidence and violated the rule as to the best evidence. There was no showing that the written orders were not available, or could not be produced, and under established rules, the contents of the orders, including the signatures attached thereto, should be proven by the orders themselves, if available. The error in this respect, we think was harmless, as, under the evidence, as we view it, there was sufficient evidence to justify the jury in finding that said Colburn was the agent of the defendant in the matter in question. We think that none of the first sixteen exceptions should be sustained.

The seventeenth and eighteenth exceptions are based upon the grounds that the verdict and judgment are contrary to law, and unsupported by the evidence in the case, and that the court erred in not granting a new trial. We have carefully examined the evidence in the case, covering nearly two hundred typewritten pages, and find no evidence in it which would justify the jury in finding that the plaintiffs and defendant made the special contract declared upon in the first count of the complaint. We think, however, that there was sufficient evidence, although the evidence was conflicting, to support a finding under the second count. The evidence for the plaintiffs tends to show that Colburn is the active director for the defendant, its treasurer, and has been for the last fifteen years; that for many years he has attended to its ordinary business matters, buying building material for it, collecting rents for it, looking after construction and repair work for it, arranging loans, etc.; that about the first of February Colburn and Ripley, one of the plaintiffs, met

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at the office of the defendant in the Kapiolani building, and Colburn said that they contemplated the addition of another or third story to said building, and wanted to have a sketch made which would show how it would look, and asked what the charge would be for such sketch, and was told by Ripley that there would be no charge if nothing further was done; that Colburn said he preferred to fix a price for the sketch, whereupon Ripley testifies that he said: "If you want a price for the sketch, we will put the figure at fifty dollars, and if you go on with the work, and complete plans are made, we will be your architects at the regular rates for architects' services," and that Colburn agreed to that; that plaintiffs worked several days upon the sketch and delivered it; that Colburn said he wanted to show it to the Prince (president of defendant) and that about two weeks after he met Colburn who told him that he had shown the sketch to the Prince and that they would go on; that thereupon plaintiffs worked several men taking measurements, figuring the strain upon the walls, making complete plans and specifications for the addition of the said story to said building, and finally completed the plans and specifications and delivered them to Colburn on or about the 30th day of April, 1912. There was some evidence by Mr. Kerr, an architect, and others, tending to show that the charge made by plaintiffs for the services rendered was reasonable, or too low, if anything, and the jury could have found under the second count that the services were rendered for the defendant by the plaintiffs, at the instance and request of the defendant, and that the same were reasonably worth the amount sued for by the plaintiffs.

The court, at the instance of the defendant, instructed the jury in regard to interest upon plaintiffs' claim, in the event a verdict was found for plaintiffs, as follows:

"In the event that the jury find for the plaintiffs upon the second count, no allowance of interest should be made for any time prior to the 7th day of November, 1912."

Notwithstanding this instruction, and in spite of it, the jury

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found interest in favor of the plaintiffs from May 1st, 1912, the time of the delivery of the plans and specifications by plaintiffs to Mr. Colburn for the defendant. Under the record we can come to no other conclusion than that the jury found for the plaintiffs under the first count, and without evidence to support the verdict. We cannot presume that the jury deliberately, or otherwise, violated the instructions given by the court; hence, we must conclude, that they failed to find for the plaintiffs under the second count on a *quantum meruit*. The verdict is not only contrary to the law as given the jury by the court, but without evidence to support it, if, as we conclude it to be, it was found under the first count. Where the complaint contains two counts, one seeking to recover for services upon a special contract, the other upon a *quantum meruit* for the same services, and it is apparent from the record and especially from the instructions of the court, that the jury found upon the first count, without evidence to support the verdict, on appeal the verdict and judgment will be ordered set aside and a new trial granted, although there is evidence in the record to support a finding under the second count, especially, as in the case at bar, when a considerable sum of unauthorized interest has been allowed by the jury.

The case seems to have been tried by counsel for the plaintiffs upon the theory that the special promise to pay a fixed amount might be established by proof showing that the promise was to pay architects' rates for such work, and that there is an established rate for such charges in Hawaii, and therefore, that the promise alleged to pay a fixed amount was proven by showing a fixed schedule for such charges in Hawaii, and that such charges made the promise, by reference, definite. The evidence does not sustain such theory, as no two of the architects who testified as expert witnesses, agreed as to the alleged schedule, or any established charge for such services.

For the reasons stated, we cannot uphold the verdict. Nor can we amend it to make it comply with our view of the law and

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evidence in this case, as that would be tantamount to this court finding the verdict, something which we do not feel authorized to do. See *Bartlett v. Hawaiian Carriage Co.*, 13 Haw. 311.

The seventeenth and eighteenth exceptions are sustained, and the cause remanded to the circuit court with instructions to set aside the verdict and judgment, grant a new trial, and for further proceedings consistent with the views herein expressed.

W. B. Lymer (Thompson, Wilder, Milverton & Lymer on the brief) for plaintiffs.

C. W. Ashford for defendant.

WILLIAM F. COOMBS AND HENRY POWELL, PART-
NERS DOING BUSINESS UNDER THE NAME OF
ASSOCIATED REPAIR WORKS, v. WILBUR ROG-
ERS.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 21, 1914.

DECIDED APRIL 24, 1914.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE WHITNEY,
IN PLACE OF QUARLES, J.

ACCOUNT—*open account.*

Where the account upon which an action is based consists of a single claim or contract which is certain and fixed in all its terms it cannot be said to be an open account.

SAME—*application of statute relating to actions on open accounts.*

Whether an account upon which an action in a district court is founded is an "open account" within the meaning of Act 52, Session Laws of 1905, is to be determined primarily from an examination of the plaintiff's complaint, and if the complaint is so framed as to permit of the proof of other than an open account the statute will be held not to apply.

APPEAL AND ERROR—*practice under writ of error to circuit court in case appealed from district court.*

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In a case where the defendant took a general appeal to the circuit court from a judgment rendered against him after a trial in a district court, and thereupon a judgment upon the pleadings was rendered against him in the circuit court which judgment is reversed by the supreme court upon a writ of error, judgment may not be entered in the supreme court in favor of the plaintiff in error on the evidence taken in the district court upon the ground of failure of proof. The case should be tried *de novo* in the circuit court.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiffs instituted an action against the defendant in the district court of Waialua, city and county of Honolulu, alleging "That the plaintiffs, at the special instance and request of the defendant, made certain repairs and performed labor and furnished and used material in repairing a certain automobile belonging to the defendant between the 26th day of March, 1913, and the 1st day of May, 1913, to the extent and value of \$294.78, all of which the said defendant promised and agreed to pay the plaintiffs. That by agreement between the plaintiffs and the defendant, the said plaintiffs bought from defendant and credited upon account of said repairs, labor and material one 'Hupmobile' at the agreed price of \$200, and which sum the plaintiffs credited upon said account for said repairs, labor and material, leaving a balance due thereon from the defendant to the plaintiffs in the sum of \$94.78, which amount and balance is past due and wholly unpaid."

A bill of particulars showing the kind and number of materials used, the prices thereof, and the amount of labor bestowed on the job, also a credit of \$200 for the Hupmobile, and the balance due, was attached to the complaint. Accompanying the complaint there was also the affidavit of one of the plaintiffs conforming to the requirements of Act 52, Session Laws of 1905, relating to suits on open accounts. It was therein stated that the "repairs, labor and material" as well as the "goods" had been "delivered to said defendant." No counter-affidavit by

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the defendant was filed. The defendant appeared personally and entered orally what was apparently regarded as a general denial, and the case went to trial. Witnesses were examined on behalf of plaintiffs and defendant. Judgment was rendered for the plaintiffs for the amount claimed, and the defendant appealed to the circuit court, jury waived. Upon the case being called up for trial in the circuit court the plaintiffs moved for judgment upon the pleadings on the ground that the action was one upon an open account, duly verified and accompanied by a bill of particulars in accordance with the statute, whereas the defendant had filed no counter-affidavit disputing any item in the account. This motion was granted and judgment for the plaintiffs was given accordingly. In this connection it appears that the defendant asked leave to file an affidavit and that the trial judge refused the request. This ruling, however, has not been assigned as error. The assignments of error present the questions whether the circuit court erred in holding that the action was one upon an open account; in holding that plaintiffs' affidavit should be taken as evidence in support of the claim; in deciding and entering judgment in favor of the plaintiffs; and in not entering judgment in favor of the defendant.

The statute provides that when an action in a district court is founded upon an open account supported by affidavit to the effect that such account is just, true and correct, that all the goods had been delivered, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as *prima facie* evidence thereof unless the party resisting the claim shall make and file with his answer a counter-affidavit stating the items and particulars which are unjust, untrue or incorrect, or otherwise, and whenever any party fails to file such counter-affidavit he shall not be permitted to deny the account or any item therein which he shall not particularize in such counter-affidavit as the case may be.

Was the plaintiffs' claim based upon an open account? This is to be determined from an examination of the plaintiffs' com-

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plaint. In *Holmes v. Fujitani*, 19 Haw. 574, it was held that an action upon an account stated or for goods sold and delivered, not accompanied by a bill of particulars or a statement of the account, is not an action upon an open account. In the present case a bill of particulars was attached. In the body of the complaint, however, it was averred that the plaintiffs, at defendant's request, performed labor and furnished certain material in repairing the defendant's automobile to the extent and value of \$294.78 which the defendant "promised and agreed to pay," and that, after crediting the price of the Hupmobile, the balance due and unpaid was \$94.78. Counsel for the plaintiffs maintain that this complaint though "not artistically drawn" is "a declaration in *indebitatus assumpsit*." Counsel for the defendant contend that the complaint shows an action upon a special contract for work and labor performed and material furnished which was fixed and certain in all its terms.

An "open account" is defined as "one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions; also one in which some item in the contract is left open and undetermined by the parties, in which sense it may exist whether there be but one item or many; but if a single claim or contract is certain and fixed in all its terms it cannot be said to be an open account." 1 Cyc. 363. "The word 'open' indicates that there is something undetermined by contract of the parties or by the application of settled rules of law, and it would seem that an account cannot be said to be open when there remains no term of the contract to be settled by agreement of the parties." *McCamant v. Batsell*, 59 Tex. 363, 369. See also *Wroten G. & L. Co. v. Mineola Box Mfg. Co.* (Tex.) 95 S. W. 744; *Northern Alabama R. Co. v. Wilson Merc. Co.* (Ala.) 63 So. 34. We think the complaint in the case at bar is open to the construction that the contract intended to be declared upon was fixed and certain in all its terms.

Strict rules of pleading are not applied in proceedings in the

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district courts, nor in cases appealed from those courts where the pleadings are the same. *Holt v. Peacock*, 18 Haw. 502. It is probable that under the allegations of the complaint in this case the plaintiffs would be permitted to prove either an express contract for the making of the repairs in consideration of the defendant's agreement to pay the sum named, or an implied promise to pay the reasonable value of the labor rendered and materials furnished. But for the purpose of determining whether the action was upon an open account so that the plaintiffs might claim the benefit of the statute in question the pleading must be taken most strongly against the pleader and if, as we find the case to be here, it is so framed as to permit of the proof of other than an open account it must be held that the statute does not necessarily apply. A defendant ought not to be barred from making a defense upon the merits for failure to file a counter-affidavit in any case where it is doubtful whether the action is one based upon an open account and falling within the purview of the statute. We hold, therefore, that the circuit court erred in holding that the statute applies in this case, and in granting the motion for judgment on the pleadings.

Counsel for the defendant argue that this court should render judgment for the plaintiff in error upon this writ under the evidence given in the district court which is in the record. We do not sustain this contention. The defendant took a general appeal to the circuit court waiving jury. That required (unless the appeal be withdrawn) a trial *de novo* in that court and the entry of a new judgment. *Bell v. Palea*, 13 Haw. 278, 281. The case was in position for trial upon the merits in that court. It will not be necessary now to pass upon the further contention advanced by counsel for the defendant that in any event the statute applies only to cases where the plaintiff's claim is upon an account for goods sold and delivered.

The order granting the motion for judgment and the judgment entered in the circuit court are vacated and set aside, and

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the cause is remanded to that court for further proceedings conformable to the views herein expressed.

R. J. O'Brien (*E. C. Peters* with him on the brief) for plaintiff in error.

L. Andrews for defendants in error.

IN THE MATTER OF THE APPLICATION OF
JOSEPH KALANA FOR A WRIT OF MAN-
DAMUS.

ARGUED APRIL 13, 1914.

DECIDED MAY 6, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

TERRITORIES—*legislative powers under Organic Act.*

By section 55 of the Organic Act the legislature of this Territory was vested with the power of taxation with all the completeness and effectiveness with which that power is vested in and exercised by the legislature of any of the States, and also the right to legislate in exercise of the police power.—*In re Craig*, 20 Haw. 483.

CONSTITUTIONAL LAW—*taxation.*

Act 99, Session Laws of 1913, was enacted by the legislature of the Territory in the exercise of the power of taxation, and so far as the petitioner in this case has questioned its validity it is held to be not unconstitutional.

SAME—*licenses, payment in full of all taxes as condition precedent to issuing.*

That portion of Act 99, Session Laws of 1913, which act amends section 1323 of the Revised Laws, as amended, providing "that no license shall be so issued until the applicant therefor shall have filed with the treasurer of the county or city and county a certificate showing the payment in full of all taxes due from said applicant on the date of said application," does not impose any penalty for the past delinquency nor attempt to punish the applicant for any past offense, hence the same is not invalid as being in conflict with the provision of the Federal Constitution prohibiting the passage of *ex post facto* laws.

In re Kalana, 22 Haw. 96.

STATUTES—*construction of—proviso.*

It is not a universal rule that a proviso applies only to the paragraph or clause immediately preceding it. Its application must be gathered from the context and a comparison of all the provisions relating to the subject-matter. The manifest intent of the legislature must be given effect even though the statute should be thereby invalidated. Because the act may be invalid if meaning what it says does not make the words of the act either dubious or ambiguous. In this case held, that the manifest intent of the legislature, as expressed in plain and unambiguous language, is to require all applicants for licenses, whether to do business in the county or city and county or throughout the Territory, to pay all taxes due, including those delinquent, as a condition precedent to the issuing of the license.

OPINION OF THE COURT BY WATSON, J.

This is an application by one Joseph Kalana, a hackdriver, for a writ of mandamus directing C. J. McCarthy, treasurer of the city and county of Honolulu, to issue to him a license to drive any licensed vehicle in the city and county of Honolulu. The applicant alleges that he is a citizen of the United States and of the Territory of Hawaii; that on November 17, 1913, he made application to C. J. McCarthy, treasurer of the city and county of Honolulu, for a license to drive any licensed vehicle in said city and county for the period beginning on the date of said application and ending with June 30, 1914, at the same time tendering to the said treasurer the sum of one dollar as and for the fee for said license, the sum of fifty cents for the stamp thereon and presenting a certificate of competency as required by law; that at the time of the making of the said application the applicant had paid in full his taxes for the year 1913 but was owing taxes for the years 1904 to 1912 inclusive in the total sum of \$55; that the said treasurer arbitrarily and in violation of law refused to issue such license giving as his reason therefor the failure of the applicant to file with him, said treasurer, a certificate showing the payment in full of all

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taxes due from said applicant for the said years, including the year 1913.

An alternative writ was allowed directing the treasurer to issue the license or to show cause to the contrary. The treasurer demurred to the alternative writ on the grounds that the facts stated in said writ do not entitle the relator to the relief demanded, in that the relator shows in the said writ that he had not paid in full all taxes due from him on the date of the said application, nor had said relator at the time of the said application filed with said treasurer a certificate showing the payment in full of all taxes due from said relator on the date of said application, both of which acts are conditions precedent to the issuance of any such license, as provided in Act 99 of the Session Laws of 1913. The demurrer was sustained and a decree entered discharging the alternative writ and dismissing the petition. From this decree the petitioner appeals to this court.

The statute under which the license is required (Act 13, Laws of 1907) is amendatory of section 97, chapter 64, Laws of 1896, Revised Laws, Sec. 1412. Its first section is as follows:

"Section 1412. Fees to Carry Freight; Drive. The annual fee for a license to carry freight or baggage for hire or compensation on any dray, cart, wagon or other vehicle other than a hand cart, shall be two and a half dollars for each vehicle so used.

"The annual fee for a license to drive any licensed vehicle shall be one dollar and such license shall permit the licensee to drive any vehicle licensed under this section."

Act 64, Laws of 1896, is a comprehensive act amending, adding to and consolidating nearly all the former laws relating to licenses and repealing such former laws. It is reenacted as chapter 102 of the Revised Laws, sections 1321 to 1418, inclusive, under the title "Licenses." Sections 1414 and 1415 (Secs. 99 and 100, Act 64, Laws of 1896) read as follows:

"Sec. 1414. Certificate from sheriff. The high sheriff or

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a sheriff, or deputy high sheriff or deputy sheriff, or an inspector appointed by the high sheriff for such purpose, shall, before any license is issued for any passenger vehicle, inspect the vehicle for which a license is requested, and the harness and the animals to be used therewith, and if he find the same to be in good serviceable condition he shall deliver to the applicant therefor, a certificate setting forth such fact, and the capacity of the vehicle. Such officer shall also examine any applicant for a driver's license, and if he find such applicant to be a competent driver he shall give him a certificate to that effect. No license shall be issued to any driver or for any passenger vehicle until the receipt by the treasurer of such certificate."

"Sec. 1415. Number on vehicle; badge. The owner of a licensed vehicle shall continuously exhibit in a conspicuous place on every such vehicle, the number of the license issued for such vehicle. Every licensed driver shall wear, while employed, a badge which shall be supplied by the treasurer at cost, showing his number."

By section 1418, Revised Laws (Sec. 103, Act 64, Laws of 1896), it is provided, *inter alia*, under the heading "Penalties," that "Any person * * * who shall drive a licensed vehicle without a driver's license;

"Or who shall violate or fail to observe any of the requirements of this chapter, or the rules made by the treasurer under this chapter, shall be fined not more than twenty-five dollars for each such violation, and the license of any such licensed vehicle or driver may, in the discretion of the court, be canceled."

Act 99, Laws of 1913, which amends section 1323, Revised Laws as amended, provides as follows:

"Section 1323. Signed by whom. Every license shall be signed by the treasurer of the County or City and County, within which the license is to be operative, and impressed with the seal of his office. Such seal shall be as determined by the board of supervisors. Provided, that any license which authorizes the licensee to do business throughout the Territory shall be signed by the treasurer of the County or City and County in which the principal office of the licensee is situated; and provided further, that no license shall be so issued until the applicant therefor

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shall have filed with the treasurer of the County or City and County a certificate showing the payment in full of all taxes due from said applicant on the date of said application."

The only questions brought up by this appeal relate to the validity and construction of the last proviso as contained in Act 99 of the Laws of 1913, "That no license shall be so issued until the applicant therefor shall have filed with the treasurer of the County or City and County a certificate showing the payment in full of all the taxes due from said applicant on the date of said application." It is not contended by the treasurer, and we think could not be successfully contended, that there is any discretionary power vested in him to refuse to issue a driver's license to an applicant who has complied with the valid terms and conditions imposed by law in that behalf (*Tai Kee v. King*, 11 Haw. 57). Respondent's sole defense in this proceeding is based on the proviso, above quoted, as contained in Act 99 of the Laws of 1913,—that the applicant has not filed with him a certificate showing the payment in full of all taxes due from applicant on the date of said application; the failure of the applicant to file with him such certificate, and the affirmative showing as contained in the petition and alternative writ that on the date of said application there was due from said applicant taxes for the ten years preceding the year 1913 in the sum of \$55. Petitioner contends (1) that the said proviso is unconstitutional and void, when applied to him, as depriving him of his liberty and property without due process of law, contrary to the provisions of the fifth and fourteenth amendments to the Constitution of the United States; (2) that the said proviso applies only in a case where the application is for a license to do business throughout the Territory, and therefore has no application in this case, as his application was only for a license to drive a hack in the city and county of Honolulu; (3) that the taxes, the payment of which is required to be shown by the certificate provided for in said proviso, are only

those that became due, or to become due, after the taking effect of the act.

Respondent disputes all of these contentions and claims that said proviso in said act constitutes a valid exercise of the police power by the territorial legislature and that requiring the payment of all taxes due from the applicant at the date of said application as a condition precedent to the issuing of the license is a proper and reasonable regulation in the exercise of such police power.

There can be no question but that as originally enacted the statute requiring the licensing of drivers and subjecting them to certain reasonable requirements therein imposed (Act 64, Laws of 1896) was in the exercise of the police power. *Sakata v. High Sheriff*, 16 Haw. 181. But in our opinion Act 99, Laws of 1913, must, to be sustained at all, stand as an exercise of the power of the legislature to enforce the payment to the Territory of the taxes legally due it, in other words, as an exercise of the power of taxation.

“Restriction of rights. Penalties imposed on delinquent taxpayers not infrequently take the form of restrictions upon the exercise of rights * * *. Such statutes are sustainable only as revenue measures” etc. 27 A. & E. Ency. L. 2 ed. 780, 781. See also *Lott v. Dysart*, 45 Ga. 356; *Frieszleben v. Shallcross*, 8 L. R. A. 337, 353.

We cannot assent to the claim, as urged by counsel for the respondent, that said proviso is a valid enactment by the legislature of the Territory in the exercise of its police power as prescribing a reasonable qualification for persons engaged in any business or occupation which requires a license for its prosecution, in this case a hackdriver, within the rule laid down in the case of *Hawker v. New York*, 170 U. S. 189, where a statute prescribing the qualifications of one engaged in the practice of medicine was upheld as being within the acknowledged reach of the police power of the State. In that case the court, speaking through Mr. Justice Brewer, said (p. 195): “We do not

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mean to say that it (the State) has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test." Again (on p. 196): "When the legislature declares that whoever has violated the criminal laws of the State shall be lacking in good moral character it is not laying down an arbitrary or fanciful rule—one having no relation to the subject-matter, but it is only appealing to a well recognized fact of human experience."

"It is within the power of the legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established." *Hawker case, supra*. In this case the ultimate fact sought to be established (so far as the police power is concerned) is whether or not the applicant is qualified and competent to drive a hack in the city and county of Honolulu.

In the case of *Sakata v. High Sheriff, supra*, wherein it was held that the high sheriff could not refuse a certificate of competency to an applicant for a driver's license on the ground of the applicant's imperfect knowledge and understanding of the English language, the court, speaking through Chief Justice Frear, said: "It needs no argument to show that one may be a competent driver without having any knowledge whatever of the English language." And in this case we are unable to see wherein the nonpayment of taxes can affect the competency or qualifications of the applicant, or what relation this requirement as to the payment of taxes can have to the competency of the applicant as a hackdriver. It is a well recognized principle of law that there must be some obvious and real connection between the actual provisions of police measures and their assumed purpose. The police power is limited to enactments which have reference to the purposes to be accomplished. For the reasons given we think that the proviso as contained in Act 99, Laws of

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1913, cannot be sustained as a valid and reasonable regulation in the exercise of the police power of the legislature.

However that may be, and whether enacted by the legislature in the purported exercise of its police power, or in the exercise of its power of taxation, as in our opinion it was, the only material inquiry with which this court is concerned is, might the proviso have been legally enacted in the exercise of either of said powers or in the exercise of any other valid power to said territorial legislature appertaining. The present chief justice, speaking for the court, in *In re Craig*, 20 Haw. 483, 490, said: "The Congress of the United States, through the Organic Act (Sec. 55), empowered the legislature of this Territory to enact 'all rightful subjects of legislation not inconsistent with the Constitution and Laws of the United States locally applicable.' The power of taxation, therein included, was conferred upon the legislature with all the completeness and effectiveness with which that power is vested in and exercised by the legislature of any of the States. *Peacock v. Pratt*, 121 Fed. 772. So also was the right to legislate in exercise of the police power conferred. *Territory v. Guyott*, 9 Mont. 46. * * * There is no good reason why a single statute should not include the exercise of both the power of taxation and the police power." We proceed then to inquire, is the proviso in Act 99 complained of inconsistent with the Constitution or any law of the United States locally applicable?

Under the first point raised by the petitioner, that the proviso is unconstitutional as being in conflict with the fifth and fourteenth amendments, counsel for petitioner urge that if said proviso is construed as requiring the payment of taxes which became due before the taking effect of the act, to wit, the 23d day of April, 1913, the same is *ex post facto* and void and deprives the petitioner of his liberty and property without due process of law within the rule laid down in *Cummings v. Missouri*, 4 Wall. 277. (The validity of the delinquent taxes for

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the years 1904 to 1912, inclusive, is not questioned by petitioner, nor is the fact that the same were legally assessed and are due and owing. But, on the contrary, it is affirmatively alleged by him in his petition and in the alternative writ that taxes are due and owing by him for such years, amounting to \$55.) In other words, instead of contending that the proviso as contained in the act is *ex post facto* within the inhibition of the Federal Constitution, which, if true, would in itself invalidate the act in so far as said proviso is concerned, counsel for petitioner assume it to be true that the same is *ex post facto* and then adopt this conclusion as a premise for the ultimate contention advanced by them that said proviso deprives him of his liberty and property without due process of law.

Under this objection, then, assuming that the act does require the payment of all taxes, including those delinquent, the only question presented for our consideration is whether or not this proviso, "that no license shall be so issued until the applicant therefor shall have filed with the treasurer of the County or City and County a certificate showing the payment in full of all taxes due from said applicant on the date of said application," is *ex post facto* within the meaning of the prohibition as contained in the Constitution of the United States.

It is argued that the proviso referred to imposes a penalty for past delinquencies and is therefore *ex post facto* in its operation. The language used does not impose any penalty for the past delinquency nor is the granting or refusal of the license in any way made to depend on the payment of taxes by the applicant as they fall due. As was said by this court in *Keola v. Parker*, 21 Haw. 597, 601, where it was held that the statute of limitations does not run against the Territory in an action to recover taxes, "the obligation of the citizen to pay his taxes is regarded as a continuing public duty which is discharged only by their payment." This statute does not attempt to punish the applicant for any past offense (*Reetz v. Michigan*, 188 U. S. 505, 510), and in its most extreme view can only be said to

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require that one who applies for a license after the taking effect of the act shall discharge his existing obligation to the Territory by paying all taxes due as a condition precedent to the issuing of the license. Our laws provide for the payment of back taxes at any time and it is clear from the language of the proviso complained of that the applicant is given until the time of the filing of his application within which to pay all taxes due from him on that date and thus entitle himself to the certificate required by the act. In this case the application for the license was made on November 17, 1913, the act having taken effect more than six months prior thereto, to wit, on April 23, 1913, and during all of that time, so far as any legal reason to the contrary existed, he might have paid the taxes affirmatively alleged by him to have been due, for the years 1904-1912, inclusive, amounting to the sum of \$55. Under the authority of *Macon and Augusta R. Co. v. Little*, 45 Ga. 370, 383, it may well be doubted whether the operation of the proviso is retrospective. In that case this same argument was advanced with respect to an act of the legislature of Georgia, known as the "Relief Act," under the terms of which no recovery in the courts of the State could be had upon a debt until the plaintiff made it clearly to appear that all legal taxes upon the debt "have been duly paid for each year since the making or implying of the debt," etc. The provisions of the act are substantially set forth in the opinion, but appear more specifically in the case of *Lott v. Dysart*, also reported in 45 Ga. on page 356.

In the case first referred to, *Macon and Augusta R. Co. v. Little*, on pages 382, 383, the court says:

"It is also said that they (the first four sections of the act) impose a penalty for past delinquencies, and are, therefore, *ex post facto* in their operation. The argument is, that the first section forbids the plaintiff to have a verdict or judgment in his favor until he has made it clearly to appear that all legal taxes upon the debt 'have been duly paid for each year since the making or implying of the debt,' etc., and that the second section requires him to file an affidavit that all legal taxes 'have been

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duly paid' 'for each year since the making of the debt,' etc., and that this affixes an *ex post facto* penalty for the non-payment of taxes, besides impairing the obligation of the contract, the words, 'duly paid for each year,' meaning paid each year as they fell due. If the legislature intended this, they have signally failed to express such intention in the language used. Our laws provide for the payment of back taxes at any time, and taxes due for many years may now be paid 'for each year,' and when paid, they are 'duly,' or properly, paid under the law. Doubtless many legislators may have voted for the Act under the impression that it required a party plaintiff to swear that he had each year paid the taxes on his debt as they fell due. Indeed, the Act seems to have been skillfully drawn with a view of creating such an impression upon the minds of a sufficient number of advocates of relief to insure its passage. It is equally clear that the language used does not require him to do any such thing, but gives him six months after the passage of the Act within which to pay his taxes and file his affidavit, if his suit was pending at the time of its passage, and up to the commencement of his suit, if it is brought after the passage of the Act. *Hence the operation of the first three sections are not retroactive.*"

However that may be, there is a clear distinction between legislation which is retrospective and that which is *ex post facto* in the meaning of the prohibition as contained in the Federal Constitution. Retrospective laws, however unjust they may be, are not prohibited by the Constitution, while the former (*ex post facto* laws) are. *Ex parte Garland*, 4 Wall. 333, 391, citing *Calder v. Bull*, 3 Dall. 386; *Satterlee v. Matthewson*, 2 Pet. 380, 413.

Since the case of *Calder v. Bull*, *supra*, the Federal Supreme Court has uniformly held that the provision of the Constitution prohibiting the passage of *ex post facto* laws applies only to legislation concerning crimes. *Re Sawyer*, 124 U. S. 200, 219; Cooley's Const. Lim., 7 ed. 373, 374. In the case of *State v. Jersey City*, 37 N. J. L. 39, where the question was presented as to whether penalties for nonpayment of taxes might be revived by subsequent legislation, the court, after holding such

statute void as being in conflict with another and entirely different clause of the state constitution, in discussing the point as to whether or not the statute in question was *ex post facto*, said (p. 43): "The Supreme Court of the United States has restricted the term *ex post facto* to criminal cases and to what may be called offenses against the law. This limitation was adopted in *Calder v. Bull*, 3 Dall. 386, and after being repeatedly recognized was adhered to in the Missouri cases reported in 4 Wall. 277. The failure to pay a tax is not a crime or strictly an offense against the law but a mere delinquency or omission. Being unable to find any case which enlarges the interpretation of this clause of the constitution, I express no opinion upon it."

So that, even if it be conceded that the proviso contained in Act 99, Laws of 1913, is retrospective in its effect, there is no constitutional provision nor any act of Congress which prohibits the legislature of the Territory from enacting such legislation. Cooley's Const. Lim., 7 ed. 373. The only restriction upon the power of the legislature of this Territory to enact all rightful subjects of legislation is that such legislation shall not be inconsistent with the Constitution or laws of the United States locally applicable. Organic Act, Sec. 55; *Re Craig, supra*. It is true that by section 5 of the Revised Laws it is provided, "No law shall have any retrospective operation." This was in the Hawaiian constitution also, but it was omitted from the Organic Act although inserted in the bill as introduced in Congress. Never having been expressly repealed the enactment still remains upon our statute books, but being a statutory direction only it could not operate on or restrain any subsequent legislative enactment which, to the extent that it might conflict with the provisions of said section 5, would have the effect of impliedly repealing such law (Ch. 5, R. L.). Without stopping further to discuss whether or not the proviso complained of in Act 99, S. L. 1913, may be considered as retrospective in its operation, we hold that said proviso is not *ex post facto* within the provi-

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sion of the Federal Constitution prohibiting the passage of *ex post facto* laws.

The two remaining points raised by petitioner relate to the construction of the proviso complained of (a) that said proviso applies only in a case where the application is for a license to do business throughout the Territory; (b) that it is to be construed prospectively, that is, as requiring only the payment of such taxes as become due after the taking effect of the act. Counsel for petitioner contend that the act recognizes two forms or kinds of licenses, one to do business in the county or city and county only and the other to do business throughout the Territory. We think this is plain from a reading of the act. But they then proceed to argue that the proviso complained of relates only to the preceding clause providing for a license to do business throughout the Territory and has no application to a license, such as was applied for by petitioner, to do business (or drive a hack) in the city and county of Honolulu only. The first sentence of the act provides that "*every* license shall be signed by the treasurer of the county or city and county," etc., this general provision relating both to licenses to do business in the county or city and county and also to the territorial licenses. There is nothing in the language of the proviso to indicate the intent of the legislature that it should be restricted in its application to those applying for licenses to do business throughout the Territory, although this restriction, had it been the legislative intent, might easily have been made to appear. "*In Minis v. U. S.*, 15 Pet. 423, Judge Story says: 'The office of a proviso generally is either to except something from the enacting clause or to qualify or restrain its generalities or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview.'" *Cooper v. Island Realty Co.*, 16 Haw. 98. "It is not a universal rule that a proviso applies only to the paragraph or clause immediately preceding it." *Cooper v. Island Realty Co.*, *supra*, 99.

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"Though the proviso is found in a section and immediately follows a particular phrase, its effect is not necessarily limited and restricted to the same section. * * * When from the context, and a comparison of all the provisions relating to the same subject matter, it is manifest that the object and intent were to give the proviso a scope extending beyond the section, and effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject matter of the proviso, or as tantamount to an enactment in a separate section, without regard to its position and connection." *Cooper v. Realty Co.*, *supra*, 100, quoting from *Wartensleben v. Haithcock*, 1 So. 38, 40.

So it would seem that a proviso is not necessarily restricted to the immediately preceding clause or phrase nor even to the same section and that its application must be gathered from the context and a comparison of all the provisions relating to the subject matter.

In this case we have held that Act 99, Laws of 1913, must be regarded as an exercise of the power of the legislature to enforce the payment to the Territory of the taxes legally due it and there is nothing in the language of the act or in its object, as we have interpreted it, to indicate that the proviso was not intended to operate with respect to county licenses as well as territorial licenses. It is obvious that the object of the legislature was to reach delinquent taxes,—this whether the same were due from an applicant for a county license or a territorial license. The collection of outstanding taxes was the end sought to be attained.

"Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and the necessity of its enactment, the defects or evils in the former law and the remedy provided by the new one, and the statute should be given that construction which is best calculated to advance its object * * * by securing the benefits intended." 36 Cyc. 1110, 1111.

"The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all of its parts may be

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brought into harmony therewith, that intent will prevail without resorting to other aids of construction." 2 Lewis' Suth. Stat. Const., Sec. 348.

Without expressly so deciding, we have already intimated that in our opinion the proviso complained of is not retroactive. We recognize the general rule to be that the retrospective operation of statutes is not favored. *Un. Pac. R. R. v. Laramie Stock-Yards*, 231 U. S. 190. But where, as in this case, the language of the statute is clear and unambiguous, the manifest intention of the legislature must be given effect, even though the statute should be thereby invalidated. There is no room for the construction contended for by petitioner and such an interpretation would be nothing short of judicial legislation. As was said by Mr. Justice Wilder, speaking for the court, in *Territory v. McDonald*, 17 Haw. 391: "But before this rule of construction can be invoked the words must be dubious. See Lewis' Sutherland Stat. Con. 367. In this case they are not either dubious or ambiguous. Because the amending act may be invalid if meaning what it says does not make the words of the act either dubious or ambiguous. Consequently, there is no reason to apply the statutory rule of construction referred to."

We are of the opinion that under the plain language of the act the proviso applies to county licenses as well as territorial licenses and that all taxes due, including those delinquent at the time of the passage of the act, must be paid before the license can issue.

During the course of these proceedings other questions have been incidentally referred to or touched upon, but none of them are relied on by appellant or discussed by him in his brief or oral argument, and in arriving at our conclusion that the decree herein must be affirmed, we have decided only those questions which were properly before us.

For the reasons stated the decree appealed from sustaining

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the respondent's demurrer, dismissing the petition and discharging the alternative writ is affirmed.

N. W. Aluli (E. K. Aiu with him on the brief) for petitioner.

P. L. Weaver, Deputy City and County Attorney, for respondent.

L. P. Scott, Deputy Attorney General, filed a brief on behalf of the Territory.

IN RE JEFF McCARN.

MOTION TO STRIKE REPORT.

ARGUED MAY 1, 1914.

DECIDED MAY 7, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

MOTIONS—*scope of motion to strike.*

When an official report, made at the request of the court, responds to the purpose for which it is intended, but contains matters which, in the opinion of a party affected thereby, are unnecessary and objectionable, his remedy is not by motion to strike the report as a whole, but by motion to strike out or expunge the objectionable matter.

ATTORNEY AND CLIENT—*disbarment—preliminary investigation—evidence.*

In a preliminary investigation to determine whether charges made against a practicing attorney should be prosecuted, *ex parte* affidavits are admissible, and an official report requested to determine the propriety of prosecuting such charges should not be stricken from the files for the reason that it was made upon evidence and *ex parte* statements made in the absence of the accused attorney who did not have the opportunity to confront and cross-examine the witnesses.

OPINION OF THE COURT BY QUARLES, J.

A petition charging Jeff McCarn, an attorney of this court, with malpractice and unprofessional conduct, based on two affi-

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affidavits, certified copies of which are attached to said petition, was filed in this court on the 8th day of April, 1914. Pursuant to the usual practice of this court the matter was referred to the attorney general with the request to examine into the same and if in his opinion he found it proper, to take the necessary steps and start proceedings, and if he found to the contrary, upon investigation, to report to the court. After examining into the matter, considering the said affidavits, and the written response, under oath, thereto by the respondent, the attorney general filed his report in which he finds that the respondent acted in good faith and recommends that the charges be dismissed. The respondent, feeling aggrieved at certain expressions of opinion contained in said report, has moved to strike the report from the files of this court. Unfortunately the report contains certain expressions of opinion which are apparently inconsistent, to some extent, with the conclusion reached by the attorney general, but in our opinion the same relate to collateral matters which are immaterial. This motion came on to be heard and was argued at length, the argument taking a wide range. We have carefully examined the affidavits in support of the charge, and the verified written response thereto, which is lengthy, and without going into the details, we are of the opinion that the conclusion of the attorney general, that the respondent acted in good faith and that the charges should be dismissed, is correct.

The only two questions presented by the affidavits, on the one hand, and the written response on the other, are whether or not the respondent was justified in filing on behalf of the wife of said Thielen a libel for divorce, it being alleged that she was insane at the time and that certain statements therein were not true, and the propriety of his taking security for a fee. We are convinced from the uncontradicted statements, under oath, of the respondent, and from the statements in the affidavits that at the time Mr. Thielen, accompanied by a certain physician, called upon the respondent with the apparent intention of

convincing him that Mrs. Thielen was *non compos* and irresponsible for her statements and that one allegation in the libel was untrue, that the respondent believed that she was not insane but of sufficient mental capacity to know what she was doing. We are convinced that the petitioner, Mr. Thielen, thought the same thing. In his affidavit he did not agree with the statement of the physician to the effect that she was "*non compos mentis* and absolutely irresponsible for her statements," for in his affidavit he said that "he believed his wife was mentally unbalanced and not responsible for her actions, but that he was not absolutely certain at that time as to her mental status." It appears without contradiction that up to that time Thielen had been negotiating with his wife in order to settle the question of alimony and that within two hours of the interview between himself, the doctor and respondent, he had personally, and through his own attorney, endeavored to agree with the respondent upon alimony to be allowed his wife *pendente lite*. Two days afterwards the libel for divorce was filed. We are convinced that the respondent was of the opinion that Mrs. Thielen was not insane at that time. The actions of Mr. Thielen both prior to filing the libel for divorce and afterwards, and thereafter on the 20th of March, four days after the libel was filed, when he sent his wife to Mr. McCarn to get a receipt for the ring which had been pledged as security for the fee, tend to show that he thought she was not insane. Otherwise it would be difficult to understand his actions in endeavoring to contract with her and settle with her upon alimony to be allowed *pendente lite*. The respondent's opinion, we think, was based upon sufficient grounds and justified him in his actions in the premises. We have carefully considered the facts relating to the divorce proceeding as they appear in the said affidavits and in the written response of the respondent and are convinced that at the time he filed the libel he believed and had good reasons to believe that the action was meritorious and a proper action for him to commence. We think that there was absolutely nothing in his conduct relating thereto which was not

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fully justified, taken in good faith, in what he believed to be and had sufficient reasons to believe to be within the line of his duty as an attorney. At the hearing the respondent insisted with considerable earnestness that the charges be investigated fully by this court and evinced the desire to have a full hearing at which he could be present, meet the witnesses against him and have the opportunity of cross-examining them. One of the grounds of his motion to strike the report of the attorney general is that certain opinions contained therein were based upon statements made to the attorney general by witnesses that the respondent did not have the opportunity to confront and cross-examine. The proceeding being preliminary, in our opinion this objection is not well taken. The position of an attorney, under circumstances like those in the case before us, is well illustrated by the court *In the Matter of Eldridge*, 82 N. Y. 161, in which Mr. Justice Finch, at page 167, speaking of the consequences of an attack of this kind upon an attorney, says: "The issue is vital to the party assailed. An adverse decision dooms him always to disgrace, and often to poverty and want. His professional life is full of adversaries. Always in front of him there is an antagonist, sometimes angry and occasionally bitter and venomous. His duties are delicate and responsible, and easily subject to misconstruction. To say that when he denies the charges brought against him he may be tried without the rights and the safeguards which belong to the humblest criminal, would be to adopt a dangerous rule and one without reason or justification. The question is important and it is best that we decide it. On the application addressed in the first instance to the court, as the mode of arousing its attention and setting it in motion, affidavits, minutes of testimony, any thing which furnishes needful information, may be used as the basis upon which to found an order to show cause. Upon the return of that order the accused is heard." The court held in that case that upon final hearing affidavits were not admissible in evidence and that the accused attorney had the right to confront the witnesses

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against him and to cross-examine them. Here the affidavits and other evidence complained of are not offered at a hearing of the charges but in a preliminary matter. The question of the admissibility of such evidence would arise if the charges should be prosecuted and heard, but not in a preliminary investigation of this kind.

The report of the attorney general was responsive to the request of the court and to the purpose for which it was requested. Some of the expressions of opinion contained therein upon immaterial matters should have been left out. Where, as in the case here, an official report is called for by the court, is made, is responsive to the purpose for which it is requested, but contains matters which, in the opinion of a party affected thereby, are improper, the remedy of such party is by motion to strike out or expunge the objectionable matters and not by motion to strike the entire report. If we should grant the motion to strike out the attorney general's report, the verified reply of the respondent attached to said report and made a part thereof would necessarily go out of the record and leave in this court only the petition of Mr. Thielen with the copies of affidavits thereto attached. We do not feel justified in granting the said motion. It is apparent that the respondent feels deeply aggrieved at certain expressions in said report and which seem inconsistent with the conclusion reached by the attorney general. We believe that any fair-minded man who will examine the record in this case, including the petition, the affidavits in support of same, the sworn answer of the respondent, and the said report cannot fail to see that the respondent acted in good faith and is not chargeable with negligence or improper conduct in the matter of filing the libel for divorce for Mrs. Thielen. As to the diamond ring, taken at the insistent request of Mrs. Thielen, we can see nothing improper, inasmuch as no rule of law or of ethics precludes an attorney from taking security offered him by a client for a fee to be paid in the future. Believing, as we do, that this is not a proper case for further inves-

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tigation, and that the time of this court should not be wasted in inquiring into conduct upon the part of an attorney which has been found to be fair, proper, and within the line of his duty, we have concluded to deny the motion and adopt the conclusion of the attorney general that the charges be dismissed.

For the reasons above stated an order will be entered denying the motion to strike the report of the attorney general and dismissing the charges against the respondent.

Jeff McCarn in proper person, *A. S. Humphreys* and *J. Lightfoot* for the motion.

I. M. Stainback, Attorney General, and *Holmes, Stanley & Olson*, contra.

TERRITORY OF HAWAII v. JOHN A. KEALOHA.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED APRIL 30, 1914.

DECIDED MAY 13, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

INDICTMENT AND INFORMATION—*grand jury*.

An indictment is not rendered invalid by reason of the participation in the finding of it of a grand juror who had been instructed by the court to take no part in the deliberations of the jury concerning another and different charge against the accused, as to which the juror had formed an opinion adverse to the accused in the absence of evidence of general bias or prejudice on the part of the juror.

EMBEZZLEMENT—*county employee—evidence of office routine*.

Where the duties of an officer or employee of a county are not defined by any law or ordinance the prescribed or established practice and routine of the office or department in which he is engaged may be shown in evidence in proof of the allegation that such officer or employee was charged or entrusted with the possession, custody or control of moneys belonging to the county, it

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not being necessary that his custody of public money as such officer or employee should be expressly authorized by statute or ordinance.

SAME—ownership of moneys embezzled.

On the trial of an employee of a county charged with the embezzlement of certain moneys which were the proceeds of a sale of rock taken from a certain quarry of which the county was in possession it is immaterial that the county had no title or only a defective title to the quarry, the defendant claiming no right or title thereto himself.

SAME—receipt of money under color of authority—estoppel.

One who has collected money under color of authority cannot defend against a prosecution for embezzlement on the ground that he was not authorized to collect it.

SAME—proceeds of sale of county property—validity of sale.

It is no defense to a charge of embezzlement of moneys derived from a sale of property by a county that the sale was not made in the manner prescribed by statute.

OPINION OF COURT BY ROBERTSON, C.J.

The defendant was convicted by the verdict of a jury upon an indictment charging him with having committed the offense of embezzlement, and he now brings to this court a bill of exceptions claiming that numerous errors were committed during the course of the proceedings in the circuit court which resulted in his conviction.

Exceptions 1 and 2 involve the validity of the indictment as affected by a certain ruling made in response to a challenge offered by the defendant to certain grand jurors and to the sustaining of a demurrer to a plea in abatement interposed to the indictment. It appears that upon the impaneling of the grand jury at the October, 1913, session of the circuit court, the defendant, who had previously been committed to the grand jury upon some charge the nature of which was not shown, challenged five of the grand jurors upon the grounds that they and each of them had signed certain charges against him in an impeachment proceeding which had been instituted in this

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court, and that they were biased and prejudiced against him. The examination of the jurors showed no general bias or prejudice but the challenges were sustained evidently on the ground that the jurors had formed the opinion that the defendant was guilty of the offenses charged in the impeachment matter. The court instructed the five jurors referred to to take no part in any proceeding against the accused regarding any of the charges made in the impeachment proceeding, but held that "they are qualified to sit in other cases." It further appears that those jurors took part in the finding of the indictment in this case, also that the charge alleged in this indictment was not one of the charges preferred against the defendant in the impeachment case. The jurors did not violate the instruction given them, but the defendant nevertheless contends that the five jurors in question ought to have been discharged from service entirely, or, at least, should have been precluded from acting in respect of any matter concerning the defendant, and that their participation in the deliberations which brought forth this indictment was sufficient to invalidate it.

The statute (R. L. Sec. 1786, as amended by Act 74, Laws of 1905) permits "any person held to answer a charge for a criminal offense," before the grand jury is sworn, to "challenge the panel, or an individual juror for cause to be assigned to the court," but there is no provision prescribing the action to be taken by the court upon the challenge of a prisoner to an individual juror being sustained. No case in point has been cited. In *U. S. v. Jackson*, 102 Fed. 473, the juror was not disqualified under the statute there applicable and the challenge was overruled, but the court of its own motion instructed the juror not to participate in the investigation of the charges pending against the accused. The question here is whether when a grand juror is instructed to take no part in the deliberations of the jury upon a certain charge because he has formed an opinion adverse to the prisoner as to that charge an indictment upon another and different charge will be invalidated by

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reason of the participation of the juror. This question was not involved in the challenges made before the grand jury was sworn, having been raised for the first time by the plea in abatement. Whether or not the point was properly and timely raised we need not determine as we feel fully justified in holding that in the absence of evidence of general bias or prejudice on the part of the jurors the mere fact that they had formed and expressed the opinion that the accused was guilty of the offenses of which the defendant was accused in the impeachment case did not disqualify those jurors from taking part in the finding of the indictment in the present case. No error was committed in the sustaining of the demurrer to the plea in abatement.

At the close of the case for the prosecution the defendant rested without adducing any evidence on his own behalf, and moved for a directed verdict of acquittal upon thirty-four grounds which may be summarized under the general statement that the prosecution had failed to prove every material allegation contained in the indictment other than the one that the defendant was a road overseer and an employee of the county of Hawaii. The indictment charged that the defendant, on the 12th day of July, 1911, "being then and there an employee of the County of Hawaii, Territory of Hawaii, to-wit, Road Overseer of the South Hilo District of the said County of Hawaii, Territory of Hawaii, and being then and there by virtue of said employment charged with the duty of collecting and receiving moneys due the said County of Hawaii, Territory of Hawaii, for and on account of goods, wares and merchandise, to-wit, crushed rock, sold by the said County of Hawaii, and being then and there charged by virtue of said employment with the duty of collecting and receiving other moneys on account of the said County of Hawaii, Territory of Hawaii, and he, the said John A. Kealoha, as said Road Overseer, being then and there, by virtue of his said employment, and with the consent and authority of

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the said County of Hawaii, entrusted with and having in his possession, control, custody and keeping of a thing of value, to-wit, certain moneys paid to him as said Road Overseer on account of the sale of goods, wares and merchandise, to-wit, crushed rock, to the amount and of the aggregate value of Forty Five and no|100 Dollars (\$45.00), a more particular description of which said moneys is to the Grand Jurors unknown, of the moneys and property of the County of Hawaii, Territory of Hawaii, without the consent and against the will of the said County of Hawaii, Territory of Hawaii, the owner thereof and entitled thereto, the said moneys then and there feloniously did embezzle and fraudulently convert and dispose of to his own use and benefit, and did then and there and thereby commit the crime of embezzlement." A demurrer was interposed to the indictment upon several grounds among which was the ground that the indictment was vague, indefinite and uncertain in that it did not allege by whom the crushed rock, the proceeds of which were alleged to have been fraudulently converted by the defendant, was sold. The court held that the indictment averred that the sale was made by the county of Hawaii. The exception to the overruling of the demurrer having been withdrawn, the rulings made by the circuit court upon the demurrer should be taken as settling the law of the case in so far as it was covered by those rulings.

On behalf of the defendant it is contended that no evidence was adduced tending to show that the defendant was charged by virtue of his employment as road overseer with the duty of collecting and receiving moneys due the county for and on account of crushed rock sold by the county. The evidence showed that the defendant was appointed road overseer for the district of South Hilo, county of Hawaii, on the 6th day of January, 1911, but his official duties seem not to have been defined further than will be stated herein. There was evidence tending to show that during a portion, at least, of the year 1911, the county of Hawaii was operating two quarries in

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South Hilo; that the defendant was in charge of the quarries in his capacity as road overseer of the district; that some time prior to the 8th day of June, 1911, crushed rock from one or both of those quarries had been sold to various parties by the defendant or by the county through him; that on the said date a resolution was adopted by the board of supervisors of the county authorizing and directing the county auditor "to open accounts with the South Hilo quarry and the South Hilo jail quarry, which shall be maintained as open accounts and are to be credited with all the sales of rock each month and to be charged with the expenses of operating the same;" that thereafter sales of crushed rock continued to be made in the manner above stated; that a considerable portion, at least, of the proceeds of such sales were from time to time paid over to the county treasurer by the defendant with the knowledge and acquiescence of the board of supervisors; that bills were rendered by the defendant to purchasers of such rock upon bills headed "Bought of South Hilo Road Department;" and that receipts for moneys paid by such purchasers were given by the defendant, signed "South Hilo Road Dept. by Jno. A. Kealoha." From this evidence, we hold, the jury could properly have found that the county had made sales of crushed rock and that the defendant was charged by virtue of his employment with the duty of collecting and receiving moneys due the county on account of such sales. Section 2966 of the Revised Laws, as amended by Act 35, Laws of 1911, provides that "If any officer or other person who, by any law, regulation, appointment, or employment, now is or hereafter shall be charged or entrusted, directly or indirectly, with the safekeeping, transfer or disbursement, or otherwise has the possession, control or custody, of any money, note, or other effects or property belonging to the Territory of Hawaii or to any political or municipal corporation or sub-division thereof shall convert the same to his own use or benefit * * * he shall be deemed guilty of embezzlement," etc. Where the duties of an officer or employee

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of a county are not defined by any law or ordinance the prescribed or established practice and routine of the office or department in which he is engaged respecting the receipt, custody and disposition of moneys may be shown in evidence in proof of the allegation that such officer or employee was charged or entrusted by appointment or employment with the safekeeping, possession or control of moneys belonging to the county, it not being necessary that his custody of public money as such officer or employee should be expressly authorized by statute or ordinance. *Ter. v. Wright*, 16 Haw. 123; *Ter. v. Richardson*, 16 Haw. 358; *Ter. v. Clark*, 20 Haw. 391. See also *State v. Silva*, 130 Mo. 440, 460.

It is contended that there was no evidence adduced tending to show that the defendant was entrusted with or had in his possession, control or custody the sum of forty-five dollars, or any sum, paid to him as said road overseer on account of the sale of crushed rock, of the moneys and property of the county, as alleged in the indictment, but that, on the contrary, it was shown that the rock referred to in the evidence was not the property of the county but of the Territory of Hawaii, and that the evidence relied upon by the prosecution as showing a sale of crushed rock, the proceeds of which were appropriated by the defendant, if it showed a sale at all, which is denied, showed a sale made by the defendant personally and not in his capacity as an employee of the county. During the cross-examination of one of the witnesses for the prosecution a document was offered in evidence by the defendant, and, without objection, was received. The instrument, dated the 9th day of June, 1903, was a release executed by the Waiakea Mill Company, Limited, lessee of the Ahupuaa of Waiakea, Hilo, to the commissioner of public lands, for the use and behoof of the Territory of Hawaii, of its right, title and interest in certain parcels of land at Waiakea including "5 acres on Waiakea known as the 'Quarry' and lying between the village of Waiakea and the pest-house on the makai side of the road." Much is sought to be made of

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this by counsel for the defendant. He argues that this evidence shows that the quarry in question was the property of the Territory and that there was nothing to show that the county had any right or title whatsoever to it, and, hence, no right in or to the rock taken therefrom, or to any moneys obtained from sales of the same. But the fact that the county may have taken possession of the quarry without any authority from the Territory would not entitle the defendant to an acquittal. That as against the Territory the county had no right of possession would not constitute a defense to the charge. Actual possession, as against one claiming no right in himself, is evidence of title, and the evidence which tended to show that the county had been and was in peaceable possession of the quarry furnished support for the allegation that the money received from the sale of rock was the property of the county. It was immaterial that the county had no legal title or only a defective title to the quarry. Wharton's Crim. Law (9th ed.) Secs. 1025, 1038. We believe that the liability of a public officer, in a case of this kind, does not depend on the legal right of the appointing power to receive the moneys or on the legal right of the officer to collect, since the essential elements are the relation of trust and a colorable right to employ, with the acceptance of the relation. 15 Cyc. 503, citing *State v. Heath*, 8 Mo. App. 99.

The transaction out of which this charge against the defendant grew, as the jury could have gathered from the evidence, may be briefly stated as follows: That one Maguire, who was the auditor of the county, approached the defendant and, as he testified, "asked him for the purchase of some crushed rock from the county for my place in Puueo;" that the defendant replied "that both the quarries were closed down," but if Maguire "was willing to pay for the labor of operation of the quarry that he (defendant) would get the rock from the Waiakea quarry;" that Maguire agreed to the suggestion, and later paid over to the defendant the money with which to pay the

labor; that the rock was delivered, and Maguire paid therefor the sum of forty-five dollars by check on the First Bank of Hilo, payable to the order of the defendant, the check being dated July 10, 1911, and cashed by the defendant on July 12, 1911; and there was evidence from which it could properly be inferred that the "Waiakea" quarry was one of the quarries mentioned in the resolution of June 8, 1911, above referred to. It further appeared by the testimony of one Field, who, it seems, was investigating the records and accounts of the county, that in the latter part of June or early part of July, 1912, the defendant admitted to Field that there was a shortage in the crushed rock account, that he had mixed the county's money with his own and "forgot to turn it in," and that the forty-five dollars paid to him by Maguire was part of the shortage. This evidence, in connection with that above mentioned, was such as to warrant the jury in finding that the sum of forty-five dollars had been received by the defendant lawfully and by virtue of his employment; that the money was the proceeds of a sale of crushed rock taken from a quarry of which the county was in possession; that the sale was made by the county through the defendant acting in his capacity as road overseer and the person in immediate charge of the quarry; that the money so received was the property of the county within the meaning of the law and the indictment; and that it had been by the defendant converted to his own use. Further, there was evidence tending to show that the defendant had received other moneys from other sales of rock which he had failed to account for, from which, together with the evidence of the admissions made to the witness Field, the jury were warranted in finding that the money received from Maguire had been fraudulently converted.

What has been said disposes of most of the points urged in brief and argument by counsel for the defendant. The numerous exceptions to rulings upon evidence and to instructions given and requests for instructions refused need not be

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particularized. The jury were elaborately instructed as to the law and its application to the case, and the instructions were very fair to the defendant. In brief, the jury were told that they should not convict the defendant unless they found from the evidence and beyond a reasonable doubt, that at the time and place alleged in the indictment the defendant was an employee, to wit, a road overseer, of the county of Hawaii; that by virtue of his employment he was charged with the duty of collecting and receiving moneys due the county from sales of crushed rock; that by virtue of his employment and with the consent and authority of the county he was entrusted with and had in his possession, control, custody and keeping certain moneys of the aggregate value of forty-five dollars; that said money was the property of the county of Hawaii; and that without the consent and against the will of the county the defendant did, at or about the time and place alleged, fraudulently convert and dispose of the said money to his own use and benefit; also that unless they found beyond a reasonable doubt that the crushed rock referred to in the indictment was sold by the county they should acquit the defendant; and that if they found from the evidence that the defendant did not embezzle money, though he did embezzle crushed rock, they should acquit him.

An exception was taken to the giving, at the request of the prosecution, of the following instruction: "If you believe from the evidence beyond a reasonable doubt that the defendant sold crushed rock for the county of Hawaii on the representation that as an officer or employee of the county of Hawaii he had authority to sell the same and that the defendant received moneys from such sales on the representation that the receipt thereof was on behalf of the county of Hawaii, and on the representation made by him that in receiving such moneys he was acting as an officer or employee of the county of Hawaii, and on the representation that as such officer he had the right to receive such moneys on behalf of the county of Hawaii, then

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you are instructed that the defendant will not be permitted to say in his defense that he had no authority in any of these respects." It is argued that there was no evidence that in the transaction with Maguire the defendant made any such representation, and that the instruction should, therefore, not have been given. But, assuming that the instruction could not be applied to the Maguire transaction for the reason stated, it was not limited to that transaction, and it was applicable to the other transactions, evidence of which was admitted on the question of intent, wherein it appeared that the defendant collected money upon bills which he rendered for rock "bought of the South Hilo road department." It may be said that as the defendant had adduced no affirmative evidence to the effect that in selling the rock and receiving the money he had acted otherwise than for and on behalf of the county and as an employee thereof the instruction was inappropriate, but as the defendant's counsel was contending that the evidence fell short of showing that the defendant had acted in these matters in pursuance of his employment we think the instruction was not inappropriate. It remains to be considered whether the instruction is sound in point of law. We believe it is. The rule often applied in this class of cases is that "One who has collected money under color of authority cannot defend against a prosecution for embezzlement on the ground that he was not authorized to collect it." In *Territory v. Clark, supra*, it was found not necessary to invoke the rule, though the court there said of it, "The doctrine of estoppel as thus set forth, when confined to the circumstances of the cases cited commends itself to our judgment." 20 Haw. 398. Besides the cases there cited, *Reynolds v. State*, 65 N. J. L. 424, and *People v. Sanders*, 139 Mich. 442, may be referred to. The instruction dealt only with representations which the jury could have found to have been made by the defendant with reference to his authority to sell rock on behalf of the county, the capacity in which he received the money for the same, and his right to receive the

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money in that capacity. Other questions were covered by other instructions, and the doctrine of estoppel was not made applicable to them. We hold that no error was committed in giving the instruction.

The defendant requested that the jury be instructed that "it was without the authority and beyond the scope of the defendant in this case to make a sale of any of the property, real and personal, of the county of Hawaii," and that "any sale of county property to be valid must have been made by the board of supervisors of the county acting as a board, and that the power of sale given to them by law is a power which could not be delegated by them, therefore I charge you that it is without the power and authority of the board of supervisors to impose upon the defendant as its employee any duty of selling its property." Counsel for the defendant refers to section 9 of the County Act (Act 39, Laws of 1905) to the point that a county has power to manage and dispose of its property as the interests of its inhabitants may require, and that by section 65 of that Act in order "to order the disposal of any property of the county" it is necessary that such order shall receive the approval of a majority of the members of the board of supervisors. The argument is that the board of supervisors was without authority to delegate to an employee of the county the power to effect sales of rock belonging to the county, and that in any event, there could be no valid sale without the formal action of the board either authorizing or ratifying it. We think it was immaterial whether the sale of rock to Maguire, or any of the other sales testified to, were made strictly in accordance with law. In other words, it would be no defense to an indictment for embezzling money derived from any such sale that it was made in a manner not authorized by law. This upon the principle above invoked that it would make no difference so far as this case is concerned that the county's right to the money may have been defective and could be questioned in some other proceeding. The substantial issue in this case, and it was prop-

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erly submitted to the jury, was whether the defendant in the course of his employment had fraudulently converted to his own use money received by him on behalf and for the account of the county, and not whether, in the transaction out of which the money came, the board of supervisors had acted in a manner not authorized by law.

What was probably the most important of the instructions given at the request of the prosecution was the following: "If you believe from the evidence beyond a reasonable doubt that the defendant did, on or about the date alleged in the indictment, embezzle and fraudulently convert to his own use and benefit, the sum of forty-five dollars mentioned in the indictment, or any portion thereof, and that the said sum was then and there the property of the county of Hawaii, and was so embezzled and fraudulently converted and disposed of as aforesaid, without the consent and against the will of said county of Hawaii, and if you further believe from the evidence beyond a reasonable doubt that at the time the said money was so embezzled and fraudulently converted and disposed of as aforesaid, said defendant had possession of the same by virtue of his employment as road overseer of the district of South Hilo, county and Territory of Hawaii, then you are instructed to find him guilty." No objection was made or exception taken by the defendant to the giving of that instruction, and under it, as already pointed out, the evidence was sufficient to warrant the jury in finding the defendant guilty.

All the exceptions have been considered and they are overruled.

L. P. Scott, Deputy Attorney General, for the prosecution.

C. H. McBride for defendant.

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ABBIE HARRISON v. L. L. McCANDLESS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MAY 6, 1914.

DECIDED MAY 13, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

LANDLORD AND TENANT—summary possession—title—jurisdiction.

In a summary proceeding, plaintiff alleged a wrongful withholding by defendant after expiration of a parol lease; defendant filed a plea to the jurisdiction of the district court, supported by affidavit, denied the tenancy alleged, and alleged possession and right of possession under a written lease for years executed to another and by the latter assigned to him: *held*, that the title to real estate had "come in question," and the district court was ousted of jurisdiction.

SAME—primary question.

In a summary proceeding by the landlord, to obtain possession of land from the tenant, the primary question is the restoration of the landlord to possession, and issues of title cannot be determined.

COURTS—jurisdiction of district courts.

District courts are courts of limited jurisdiction and can only act within the authority vested in them by law.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced a summary proceeding in the district court of Honolulu against the defendant to recover possession of certain premises alleged in the declaration to have been leased, by parol, by the plaintiff to the defendant for one year, and wrongfully withheld from plaintiff by the defendant after expiration of said lease. The defendant filed a plea to the jurisdiction of the district court based upon the ground that the title to real estate was involved, which plea was accompanied by affidavit, pursuant to rule 15 of this court, wherein, after preliminary matters, it was stated: "That the defendant is in possession of the premises described in the petition, not as

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alleged by the plaintiff under a lease from Abbie Harrison, and that the defendant is not and never has been tenant as alleged in the complaint herein; defendant is in possession as successor in interest as lessee from E. P. Aikue and Mrs. A. Harrison to Gum Lock, under a lease dated December 2, 1907, recorded in book 293, at page 235, and that by various mesne conveyances the said leasehold has been acquired by the defendant. That thereby the defendant is the owner of a leasehold interest having a term of ten years from January 1st, 1907. That the defendant is not a tenant under any other leasehold."

The plea was overruled in the district court and a judgment for restitution entered in favor of the plaintiff, from which the defendant appealed to the circuit court, where said plea was overruled and judgment of restitution in favor of the plaintiff entered. The defendant moved for a new trial in the circuit court upon various grounds, the first one of which was that the court erred in overruling his plea to the jurisdiction of the court. The motion for a new trial was denied, and the defendant brings the case here upon exceptions.

In our view, the plea to the jurisdiction of the district court was well taken and should have been allowed. This being true it is unnecessary to discuss any other question in the case.

The summary proceeding was provided for the protection of landlords against tenants who have violated some material condition of the lease, or wrongfully withhold possession after expiration of the lease, in order to avoid the delay and expense incident to actions in ejectment. The fact of possession in a summary proceeding is the principal question, incidental to which expiration of the lease or forfeiture thereof may arise, but no question of title can be litigated in such proceeding. (*DeFries v. Kanakanui*, 20 Haw. 712.) The remedy does not apply where the relation of landlord and tenant is denied, but only where it "confessedly existed." (*Kaaihue v. Crabbe*, 3 Haw. 768; *Coney v. Manele*, 4 Haw. 154.) We interpret the

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rule to extend only to cases where the relation of landlord and tenant, as alleged in the plaintiff's declaration, is not denied. Here, the defendant denies the execution of the parol lease alleged by the plaintiff, and asserts possession and the right of possession under a written lease for a term of years executed by E. P. Aikue and Mrs. A. Harrison to Gum Lock, running until December 31, 1916, and assigned to the defendant. This is an assertion of title, raised a question of title, and ousted the district court of jurisdiction. Any instrument which is evidence of the exclusive right of possession of land in a party, is title; and the assertion of such raises a question of title within the meaning of the proviso to section 1662 Revised Laws denying to district courts jurisdiction in cases where "the title to real estate shall come in question." (Webster's Dictionary; *Rodgers v. Palmer*, 33 Conn. 155; *Gregory v. Kanouse*, 12 N. J. L. 62; *Houston v. Farris*, 71 Ala. 570; *Campfield v. Johnson*, 21 N. J. L. 83; *Pratt v. Fountain*, 73 Ga. 261; *Carroll v. Rigney*, 23 Atl. 46; *Ehle v. Quackenboss*, 6 Hill 537; *Grosso v. City of Lead*, 68 N. W. 319.) In actions of trespass *quare clausum fregit* where the amount of damage claimed is within the jurisdiction of a district court, it has jurisdiction, unless a question of title is raised, when it is ousted of jurisdiction. (*In re Kameeui*, 6 Haw. 542; *Ward v. Kamaooulu*, 9 Haw. 619; *Kaneohe Ranch Co. v. Ah On*, 11 Haw. 275; *Brown v. Koloa Sugar Co.*, 12 Haw. 409.) In *Roy v. Scott*, 17 Haw. 598, it was held that the question of title having arisen in a case of trespass *quare clausum fregit*, the district court was ousted of jurisdiction, and that on appeal to the circuit court the latter has no jurisdiction. The plea to the jurisdiction of the court, supported by the proper affidavit, raised a question of title, the merits of which could not be litigated in the summary proceeding, inasmuch as the plea ousted the district court of jurisdiction. If the merits of the question of title raised by such a plea may be litigated and determined in summary proceedings, the said proviso to section 1662 Revised

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Laws would be violated in letter and spirit. District courts, being courts of limited jurisdiction, can only act within the authority vested in them by law.

The exceptions are sustained, and the cause remitted to the circuit court for further proceedings consistent with the views expressed in this opinion.

C. W. Ashford for plaintiff.

P. L. Weaver for defendant.

TERRITORY OF HAWAII v. MARY ANN PETER.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED APRIL 24, 1914. .

DECIDED MAY 18, 1914.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF QUARLES, J.

TRIAL—*improper remarks of judge.*

In a criminal prosecution, where there is no lack of evidence to support a conviction, impatient and improper remarks of the court to defendant's counsel will not warrant a reversal. The evidence must be looked to to ascertain whether the verdict is responsive to it or to extraneous matter. In this case held, that while the remarks of the judge were improper and apparently uncalled for they do not warrant a reversal of the case.

EXCEPTIONS, BILL OF—*exception to instruction—too general.*

A general exception to the oral charge given by the court, when such charge consists of a series of propositions, cannot be sustained if any portion thus excepted to is sound.

CRIMINAL LAW—*keeping house of ill fame.*

Under section 3162, Revised Laws, the term "house of ill fame" is no doubt a synonym for "bawdy house," having no reference to the fame of a place but denoting a fact. The gist of the offense is the keeping and use of the house for purposes of prostitution and lewdness and not its reputation. The statute does not re-

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quire that the place be used habitually or for any considerable length of time for the prohibited purposes in order to constitute the offense in question.

OPINION OF THE COURT BY WATSON, J.

The defendant having been tried, convicted and sentenced on a charge of keeping a house of ill fame under section 3162 of the Revised Laws, brings the case here on exceptions. The bill of exceptions as transmitted to this court is hardly intelligible by reason of the many interlineations, substitutions and amendments endorsed thereon in ink by the trial judge in settling and allowing the same.

Exception 1 relates to certain remarks of the trial judge in the presence of the jury and directed to the attorney for defendant and one H. C. Mossman, a district court practitioner, who was then sitting by the side of said attorney. From the transcript the following colloquy appears to have taken place: The court: "In what capacity are you acting in this case, Mr. Mossman?" Mr. Mossman: "I am helping Judge Quarles as Hawaiian interpreter. I am assisting him as interpreter." The court: "I have good hopes for Mr. Mossman. I have no hopes for a young man who works himself into a hard case. He can act as interpreter." The court: "I advise you, as soon as you can, Mr. Quarles, to get an interpreter. It is disgusting for a young lawyer to work himself into such a case." Mr. Quarles: "I have to take an exception to the remarks of the court, said in the presence of the jury." The court: "You can have an exception. I say that to you and I now ask you to get an interpreter as soon as you can to serve your purposes." We are not called upon to pass upon the propriety or impropriety of these remarks of the judge, the only question we can properly consider being whether the same constituted reversible error. "The probable effect of any such comments must be measured largely by the facts of the case presented." *Pinkerton v. Sydnor*, 87 Ill. App. 76, 82. "In a criminal prosecution,

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where there is no lack of evidence to support a conviction, impatient and improper remarks of the court to defendant's counsel will not warrant a reversal. The evidence must be looked to to ascertain whether the verdict is responsive to it or to extraneous matters." *Tuttle v. State*, (Ark.) 104 S. W. 135, 137. In our opinion, the evidence as presented was sufficient to sustain the verdict. The remarks of the judge complained of, while improper and apparently uncalled for, do not warrant a reversal of the case.

Exception 2 is to the oral charge given by the court to the jury of its own motion. The exception noted by counsel to the giving of such oral charge was a general one as follows: "Mr. Quarles: The defendant excepts to the oral charge given by the court." The charge is a somewhat lengthy one, consisting of a series of propositions but containing, as this court believes, considerable irrelevant and objectionable comment and some erroneous propositions of law. Portions of the charge, however, may, in our opinion, be sustained as correct expositions of the law. The general exception noted is insufficient and must be overruled. In the case of *Territory v. Lau Chong*, 20 Haw. 235, Chief Justice Hartwell, speaking for the court, said: "The statutory right (Sec. 1863 R. L.) to except to any instruction of a judge in any matter of law (Sec. 1863 R. L.) does not contemplate a general exception to an entire charge or to a series of instructions or propositions of law, unless it is bad throughout. * * * The law is correctly stated in *Shelp v. U. S.*, 81 Fed. 694, 700: 'An exception to an entire charge of a court or to a series of propositions contained therein cannot be sustained if any portion thus excepted to is sound.'" See also *Territory v. Johnson*, 16 Haw. 743, 757; *Territory v. Hale*, 18 Haw. 665.

Exception 3 is to the verdict as contrary to the law and the evidence. We have carefully examined the transcript of evidence and are of the opinion that the same amply supports the verdict of the jury. Each of four witnesses called for the prosecution, Christina Peter, Louisa Kapule, Mary Kamee and

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Mary Ann Kahookamoku, all girls under the age of sixteen years, and one of them the daughter of the defendant, testified that she had on one or more occasions, at the house of the defendant and with her knowledge, had unlawful sexual intercourse with men. The evidence of two of these witnesses was to the effect that the money received by them from their male companions for this illicit intercourse was given by them to the defendant, and one of the witnesses, Louisa Kapule, testified that the defendant had told her to ask her male companions "to give money for the house." We believe that the evidence was amply sufficient to sustain the verdict. Counsel for defendant cite the case of *Provisional Government v. Wery*, 9 Haw. 228, wherein it is held by this court that a person could not be convicted upon a charge of keeping a disorderly house, to wit, a house kept for the sale of intoxicating drink without a license, by proof of a single act of sale without proof of other facts or circumstances tending to show that the house was occupied for that purpose, and counsel argue that there was no evidence whatever in this case showing the reputation of the house kept by defendant and that it was a house of ill fame. The *Wery* case does not seem to be in point, as in this case there is evidence that the house of the defendant was resorted to on many occasions by young girls for the purposes of prostitution and lewdness. Evidence of the reputation of the house was not essential under the statute. "The object of the statute is not to protect the reputation of the house but to cherish and promote good morals. 1 Bishop, Crim. Law, Secs. 665, 947, 1038; *Commonwealth v. Lambert*, 12 Allen 179. * * * The term 'house of ill fame' is no doubt a synonym for 'bawdy house,' having no reference to the fame of a place but denoting a fact. The gist of the offense is the keeping and use of the house for purposes of prostitution and lewdness, and not its reputation. * * * A single act of illicit intercourse in the house or any number of acts with the proprietor alone would not make the

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place a house of ill fame, but it must have been used for that purpose more than once by others than the proprietor. The statute does not require that the place be used habitually or for any considerable length of time for the prohibited purposes in order to constitute the offense in question." *The State v. Lee*, 80 Ia. 75, 80, 81, 83.

The only remaining exception which was taken to the overruling of defendant's motion for a new trial raises only questions that have already been disposed of under other exceptions.

Exceptions overruled.

D. H. Case, County Attorney of Maui, and E. Vincent, Deputy County Attorney of Maui, for the prosecution.

L. Andrews for defendant.

FUGITA v. W. MOTOSHIGE AND CLEMENT CROW-
ELL AS SHERIFF OF THE COUNTY OF MAUI,
TERRITORY OF HAWAII.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

SUBMITTED MAY 18, 1914.

DECIDED MAY 22, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*nonsuit—exemption.*

A judgment of nonsuit is properly entered in an action to recover a horse, wagon and harness levied upon under execution, and claimed to be exempt, where plaintiff fails to show that he is within one of the classes of persons protected by the statute.

STATUTES—*interpretation—words and phrases.*

Section 1831, R. L., as amended, which exempts specified chattels by which a person following one of a number of enumerated occupations, "or other laborer," actually earns his living, from levy and sale under execution, held, not to apply to a person using any of such chattels in conducting a scheme in the nature of a lottery or game of chance.

Fugita v. Motoshige, 22 Haw. 136.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced an action of replevin to recover a horse, wagon and harness seized by the defendant Crowell, as sheriff of the county of Maui, under an execution in favor of the defendant Motoshige, basing his action upon the ground that the articles levied upon are exempt from execution. Defense, the general issue. At the close of plaintiff's case the defendants moved for judgment of nonsuit which was granted. Plaintiff appeals to this court upon the point of law that the court erred under the evidence in rendering judgment of nonsuit. The seizure as alleged, demand for return, and value of the chattels seized, were admitted. On direct examination the plaintiff testified as follows: "My name is Fujita. I know W. Motoshige and Clement Crowell, defendants in this case. On the 23rd of March, A. D. 1914, Deputy Sheriff John Ferreira took from my possession 1 horse, 1 wagon and 1 set of harness, this property has not been returned, it was seized under execution. The horse was valued at \$65.00, \$18.00 for wagon and \$7.00 for harness. I was the owner of this property at the time it was seized. I was making my living by the spinning wheel at the time of seizure of this property. (Ex. 'A') I was using the horse wagon and harness going from place to place with this device at the time of seizure. I was going to Paia, Makawao, Puunene, Waikapu &c. I did not have any other means or horse and wagon, by which I could convey my things to the different places. This was the means I used to make my living at the time, and for about 4 years prior to the seizure, I lived in Wailuku about 14 years. I would make no profit if I had to hire a team to take this around. I had goods other than horse and wagon. I have the goods yet. I have the goods here now. I make from 30.00 to a hundred dollars a month. I once made \$120.00. Witness opens a basket and displays his stock of goods which he carries from place to place working the game. Goods consists of a

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variety of small articles carried in a hamper about 2 ft. 6 inches x 1 ft. 6 x 1 ft. I claim the horse wagon and harness is exempt from execution for the reasons set forth in my letter to the Sheriff dated April 6-7th inst."

The ground of exemption stated in the written demand made on the defendant sheriff, is: "I used the same in a line of business similar in its character to the specific occupations named in section 1831 of the Revised Laws of Hawaii, as amended by Act 39 of the Session Laws of Hawaii of 1911, and that such use was and is necessary in order to enable me to earn my living." On cross-examination the plaintiff explained the working of his "spinning wheel" which was introduced in evidence, the same being what is ordinarily termed a "wheel of fortune," having lines radiating from a common center, and the numbers one to eight inclusive placed within an inner circle designating certain lines, the other numbers, nine to thirty-two, being placed at the outer rim of the wheel designating other lines; two arms revolving on a standard, to one of which a thread and needle are attached. The scheme, as explained by plaintiff, is worked as follows: The player, if he desires one "spin" pays ten cents, or if he desires three "spins," pays twenty-five cents; the arm is then given a turn so as to make it spin around and the number at which the needle stops indicates the corresponding prize drawn by the player. The plaintiff testified that each number drew a prize, but did not state the value of the various prizes. He introduced in evidence a basket of goods used by him as prizes, but the evidence does not show the value of the several articles. Inspection of the goods indicates the greater number of the articles are of very little value while others are of greater value, among which is a razor upon the case of which the price is stamped as being \$3.00.

The district court sustained the motion of nonsuit upon the ground that the evidence did not show that the plaintiff actually used the chattels in earning a lawful living. The motion was

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properly sustained upon the ground stated, and also upon another ground apparent upon the record. The plaintiff did not show that he was engaged in hauling freight or persons from one place to another, hence he did not show that he is a "cartman," "drayman," "truckster," "hackman," "teamster," "chauffeur," or "driver" within the purview of section 1831 Revised Laws as amended by Act 71, Session Laws of 1913. He testified that he had no peddler's license, and that the authorities informed him that his business was such as to require no license. On his own showing he was not traveling from place to place selling goods, wares and merchandise, hence he did not show that he was a "huckster" or a "peddler." Was he an "other laborer" within the meaning of the statute? The word "laborer" is used ordinarily to designate a person who follows a toilsome occupation as distinguished from that of an artisan or skilled person. Ordinarily, it does not include one whose labor is mental rather than physical. It generally signifies one who is an employe. The phrase "other persons" in statutes like that under consideration is generally interpreted to include such persons only as are within the spirit and general intent of the statute. This phrase is not used in our statute, but that of "other laborers," which should receive a similar interpretation. We find this phrase immediately following the words "hackman, teamster, chauffeur and driver," evidently referring to persons who work or labor and actually use the exempted article or articles in "earning a living." Our statute intended to include three classes of persons, viz: first, those who haul persons or freight, or both, from place to place for hire; second, those who travel from place to place selling goods, wares and merchandise; third, physicians, surgeons and ministers of the gospel.

The burden was on the plaintiff to show that he was within one of the included classes. He failed to do so. Conducting a game, or carrying on a scheme wherein mere chance is a control-

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ling and impelling element, can hardly be said to constitute one a laborer within the meaning of the statute. The meagre description given by the plaintiff of his operations, the exhibition of the device used by him, and of the goods, and the different value of the various articles, are sufficient to raise the inference, in the absence of further explanation, that the scheme was in the nature of a lottery. The district court evidently so concluded, rightly we think. The statute was intended to protect persons engaged in lawful occupations. The law does not favor persons conducting lotteries or any species of gambling. The statute was not intended to exempt from execution any property used in other than lawful occupations. The evidence does not show that the plaintiff is engaged in any of the occupations named in the statute, and does not show that he was using the horse, wagon and harness levied upon in "actually earning a living" in any occupation or profession protected by the statute.

Judgment affirmed.

Plaintiff in person.

E. Murphy for defendants.

JOHN MACAULAY *v.* F. SCHURMANN AND
L. McMANUS.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MAY 13, 1914.

DECIDED MAY 29, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

BILLS AND NOTES—*statute of limitations—payment by co-maker.*

The payment of interest by one of two joint and several makers of a promissory note within the period of limitation will start the statute of limitations to run afresh as to the other, as well as the one who made the payment, though the payment was made without the knowledge or authorization of the other.

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OPINION OF THE COURT BY ROBERTSON, C. J.

(Quarles, J., Dissenting.)

In an action of assumpsit upon a promissory note the defendant-in-error, who was the plaintiff below, recovered a judgment which the plaintiff-in-error, Schurmann, seeks to have reversed. The note, which was for \$500, was the joint and several one of the plaintiff-in-error and one McManus, executed in California on September 18, 1907, and due six months after date. The defense was the statute of limitations. Payments endorsed on the note were as follows: January 15, 1908, interest to December 18, 1907, \$10; April 6, 1909, interest to February 18, 1909, \$52; January 7, 1911, interest to January 3, 1911, \$84.39; January 7, 1911, on account of principal, \$15.61; August 20, 1911, interest to April 3, 1911, \$9.66. The first payment of interest was made by the plaintiff-in-error, who, a few months later, left California and arrived in Hawaii in July 1908. The other payments were made by McManus without the knowledge or authorization of the plaintiff-in-error, though the latter had supposed that McManus had paid the note. The action was commenced on September 23, 1912.

The question to be determined is the much discussed one as to whether a payment made by one joint obligor on account of the principal or interest on a debt will start the statute of limitations to run afresh as to a co-obligor. Our statute provides that actions for the recovery of any debt founded upon any contract, obligation or liability, excepting such as are brought upon the judgment or decree of some court of record, shall be commenced within six years next after the cause of action accrued (R. L. Sec. 1971) but that where the cause of action has arisen in any foreign country action upon it shall be commenced within four years after it accrued (R. L. Sec. 1976). The action against Schurmann, therefore, was barred unless the payments made by McManus served to toll the statute. "Payment of interest is, of course, evidence that the

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principal is owing up to the date to which the interest is reckoned." *Warren v. Nahea*, 19 Haw. 382, 384.

In *Whitcomb v. Whiting*, 2 Douglas 652, decided in 1781, it was held that in the absence of fraud payment of interest by one of several makers of a joint and several promissory note takes it out of the statute of limitations as against the others, Lord Mansfield saying "Payment by one is payment for all, the one acting, virtually, as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." That case was criticized by Lord Ellenborough in *Brandram v. Wharton*, 1 Barn. & Ald. 463, though he admitted its authority, and it remained the accepted rule in England until changed by statute. *Burleigh v. Stott*, 8 B. & C. 36; *Wyatt v. Hodson*, 8 Bing. 309. Lord Tenterden's Act, passed in 1828, limited the effect of written acknowledgments and new promises to the parties making them, and contained the proviso that "nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." The rule as to payments was completely changed however by the Mercantile Law Amendment Act of 1856 (19 and 20 Vict. c. 97) which provided that no co-contractor or co-debtor, whether bound jointly only or jointly and severally with others, shall lose the benefit of the statute of limitations so as to be chargeable by reason only of the payment of any principal or interest by another or others of such co-contractors or co-debtors. Of the early decisions in this country some followed the rule laid down in *Whitcomb v. Whiting* while others repudiated it as being unsound. In Wood on Limitations (3d ed.), Sec. 285, it is said that "The doctrine of *Whitcomb v. Whiting*, that an acknowledgment, new promise, or payment, made by one of two or more joint contractors, will remove the statute bar as to all, has practically but little force at the present day, as in many of the States the legislature has expressly overridden it by providing that

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no acknowledgment, promise or part payment made by one joint debtor shall deprive the others of the benefit of the statute; while in others the same result is practically reached by a provision that no acknowledgment or promise shall be sufficient to revive a debt, unless it is made in writing, under the hand of the party to be charged thereby; and in others, the courts, without any express legislation, have repudiated the doctrine as unsound, predicated upon erroneous reasoning, and opposed to the spirit of these statutes. Especially is this the case in New Hampshire, Pennsylvania, Tennessee, Kansas, Florida, Maryland, Illinois, and by the United States Supreme Court; while in Connecticut, New Jersey, Rhode Island and Delaware the doctrine of *Whitcomb v. Whiting* is still adhered to. It is not necessary to discuss the accuracy of this doctrine, as it has been attacked and also sustained by some of the ablest judges in this country; and the judgment of the profession, as well as of the people generally, as to the wisdom of the doctrine is best evidenced by the circumstance that it has been nearly obliterated by legislative and judicial action." In a note the author names thirty-two States in which the law has been settled by statutory enactment. The United States Supreme Court case referred to by the author is that of *Bell v. Morrison*, 1. Pet. 351. The case arose in Kentucky, and the question was whether the acknowledgment of a debt by one partner, after a dissolution of the copartnership, was sufficient to take the case out of the statute of limitations as to the other partners. It was held that it was not. Mr. Justice Story, delivering the opinion, said that Lord Mansfield's reasoning in *Whitcomb v. Whiting* was "certainly not very satisfactory;" he pointed out that the "English cases decided since the American revolution, are, by an express statute of Kentucky, declared not to be of authority in their courts;" that in Kentucky the question was "quite open to be decided upon principle;" that a review of the Kentucky decisions led to "the most serious doubts, whether the state courts of Kentucky

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would ever adopt the doctrine of *Whitcomb v. Whiting*," and concluded by saying that "this opinion thus expressed is not unanimous, but of the majority of the court; and as it is apparent, from the preceding reasoning, it has been principally, although not exclusively, influenced by the course of decisions in Kentucky upon this subject." In the case at bar, however, we are confronted by section 1 of the Revised Laws providing that "The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory of Hawaii, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage." On behalf of the plaintiff-in-error it is contended that the trend of cases heretofore decided by this court is such as to require us to adopt the modern doctrine, but we find no case in our reports which can be regarded as a precedent in the decision of the question involved here. The legislature of this Territory having seen fit not only not to pass a statute such as has been enacted in England and so many of the States but to expressly enact the common law (with exceptions which do not apply here) we have no option but to apply the rule of the common law. In ascertaining what the common law is we are to consult American as well as English decisions. *Ena Estate v. Ena*, 18 Haw. 588, 591. And, as pointed out in *Dole v. Gear*, 14 Haw. 554, 561, the common law consists of principles and not of set rules and admits of different applications under different conditions, but none of the considerations referred to by Chief Justice Frear as reasons for preferring the modern view to the old one on the question there discussed apply here. The English act of 1856 is, of course, too recent to be regarded as a part of the common law. *In re Frank B. Craig*, 20 Haw. 447, 450. In *Cowhick v. Shingle*, 5 Wyo. 87, 95, the court said "As a rule the term 'common law' means both the common law of England as opposed to statute or written law, and the

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statutes passed before the emigration of the first settlers of America. And applying this definition to the matter in hand, I am unable to perceive that there is any 'common law' rule upon the subject. At common law there was no limitation as to time upon the right to bring a personal action. Such limitations are and always have been pure creations of the statute, and the rule contended for is a rule which grew up and developed in the construction of the statute of 21st. James 1, and in no other way. It was first announced in 1781 by Lord Mansfield in *Whitcomb v. Whiting*, and, while any statement of the law made by that great judge is entitled to great weight and respect, his declarations even as to the common law are simply persuasive authority." We are unable to take that view of the matter. The decision in *Whitcomb v. Whiting* did not turn upon the construction of the statute of limitations but upon a principle of the law of contracts. That this is so appears from the discussions in cases in which Lord Mansfield's reasoning has been disapproved. Thus, in *Bell v. Morrison, supra*, Justice Story said "It assumes that one party who has authority to discharge has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now, this very often constitutes the matter in controversy. It is true, that a payment by one does inure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt. * * * A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt, at the time when acknowledgement was made." 1 Pet. 368. See also *Van Keuren v. Parmelee*, 2 N. Y. 523, 527. And so in the case at bar, although the

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ultimate question to be decided is whether the defense of the statute of limitations can be sustained, the determination of that question depends entirely upon the preliminary but vital question as to whether in contemplation of law the payments which were made upon this note by McManus amounted to an acknowledgment of or a promise to pay the debt by the plaintiff-in-error, for if the law is that a payment by one maker of a promissory note affects his co-maker to such extent then the defense relied on has failed. The latter question is one of contract—of agency—and obviously does not involve the construction or application of any provision of our statute of limitations. It seems to be generally conceded that *Whitcomb v. Whiting* determined the common law on the subject. In *Brown v. Hayes*, 146 Mich. 474, 476, the court said "At the common law, according to the weight of authority, a payment by one jointly bound was, unless the statute established a contrary rule, sufficient to prevent the running of the statute. The leading case is *Whitcomb v. Whiting*, 2 Doug. 652. This was followed in *Wyatt v. Hobson*, 8 Bing. 309, which latter case was cited by Mr. Justice Cooley in *Mainzinger v. Mohr*, 41 Mich. 685, as establishing the common law rule first enunciated in *Whitcomb v. Whiting*." And in *Cross v. Allen*, 141 U. S. 528, 535, the court said "At common law, a payment made upon a note by the principal debtor before the completion of the bar of the statute, served to keep the debt alive, both as to himself and the surety. * * * This is the rule in many of the States of this Union—in all, in fact, where it has not been changed by statute."

However much we may prefer the rule prescribed by modern legislation, we hold that the common law rule must control and that the payments of McManus which were made within the period of limitation prevented the statute from running in favor of the plaintiff-in-error.

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Judgment affirmed.

J. Lightfoot for plaintiff-in-error.

Holmes, Stanley & Olson for defendant-in-error.

DISSENTING OPINION OF QUARLES, J.

Being unable to agree with the reasoning and conclusion of my associates, it is my duty to set forth the reasons which prevent me from so doing. The majority opinion is based upon the idea that one of two joint obligors is the agent of the other for the purpose of all things connected with the obligation common to both, and may, expressly or impliedly make a new contract binding both, renewing or continuing the old obligation; that part payment of one, even though made without the knowledge, consent, or express authorization of the other, is an acknowledgment of the debt, and that from this acknowledgment the law implies a promise on the part of both, to pay the balance of the debt. Much discussion has been had in regard to the cause of action in such cases, but the settled rule is that in assumpsit upon an obligation upon which an action has not been brought within the statutory period, but upon which the bar has been removed or suspended by a new promise, that the action must be upon the new promise. This new promise is either express, as where the debtor makes a new promise to pay; or it is implied, as where the debtor by unequivocal acknowledgment admits the existence of the debt, and his liability therefor, in which case the law implies a promise on his part to pay. Part payment is universally held to be such an acknowledgment as to justify the implication of a new promise, unless it is made under such circumstances as repel the presumption. The English statute adopted early in the seventeenth century (James I, c. 16) limiting the time within which certain personal actions could be brought, was, at first, interpreted and enforced by the English courts in accord with its letter and intent. Later the statute grew into disfavor, and the

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English courts seized upon every possible pretext to take cases out of the statute and thereby avoid the operation of the statute. Such was the condition in England at the time of the decision in *Whitcomb v. Whiting*. That decision resulted in so much fraud and hardship, that long prior to the adoption of the English common law in Hawaii, Parliament was forced to enact legislation abolishing the rule announced by Lord Mansfield in that case. It has for many years, both prior and subsequent to January 1, 1893, been the settled policy of our courts to give force and effect to the statute, and to regard it as a statute of repose perforce of which a cause of action was destroyed, unless brought within the prescribed time, or unless there has been a new promise within the prescribed time which will support the action. In *Bell v. Morrison*, 1 Pet. 351, this policy is well stated, and the American rule which gives force and effect to the statute of limitations, and frowns upon evasions of it on technical grounds, is well illustrated. The decision in *Whitcomb v. Whiting* was condemned, its reasoning shown fallacious, and a rule contrary thereto was announced in the last named case by the Supreme Court of the United States. The court there said, referring to the decision of Lord Mansfield in *Whitcomb v. Whiting*: "This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes, that one party, who has authority to discharge, has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now this very position constitutes the matter in controversy. It is true, that a payment by one does inure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt. If such payment were made, after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt,

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pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them. When the statute has run against a joint debt, the reasonable presumption is, that it is no longer a subsisting debt; and therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all; the one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt, at the time when such acknowledgment was made." As early as 1865, the supreme court of Hawaii, in *Pustau v. Rixman*, 2 Haw. 730, said: "The tendency of modern legislation, we believe, in all commercial states, is rather to shorten than to extend the limit as to time, within which actions of any kind may be maintained, with a view to further the speedy settlement of controversies, to give additional facility to transactions affecting the possession and transfer of property, and to promote that repose which is the chief object of all such legislation." That case was an action upon a merchant's account, and the court held that the statute of six years applied, although merchants' accounts were not named in the statute. The court also held that payments by an assignee to whom the debtor had made a deed of conveyance of his property for the purpose of paying his debts, did not remove the bar of the statute, nor take the case out of its operation. The principle, and reasoning of that case, are contrary to the rule announced in the majority opinion, in my view of the same. In *Ahlo v. Tai*

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Lung, 9 Haw. 272, the same question arose. The debtor had made an assignment for the benefit of his creditors, expressly authorizing the sale of his property and the payment of the proceeds to his creditors, yet the payments made by such assignee were held not to be payments by him, although the grounds for holding that the relation of principal and agent existed are far stronger than in the case of co-obligors or joint contractors, and no new promise was implied. The court quoted with approval from a number of cases, directly in line with my view of the proper rule to be applied, among others that of *Campbell v. Baldwin*, 130 Mass. 200, as follows: "The ground upon which a part-payment is held to take a case out of the statute is that such payment is a voluntary admission by the debtor that the debt is then due, which raises a new promise by implication to pay it or the balance. To have this effect it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment. In the case at bar the plaintiff executed a mortgage in which he gave to the mortgagee a power to sell the estate and to appropriate the proceeds to the payment of the mortgage debt. But this cannot fairly be construed as an authority to the mortgagee to make a new promise on behalf of the mortgagor to pay the debt, so as to avoid the statute of limitations." Among other cases cited in *Ahlo v. Tai Lung*, *supra*, appears that of *Stoddard v. Doane*, 7 Gray 387, where the debtor in a schedule accompanying his assignment mentioned his creditors, and his assignee in accordance with the authority given him, made payments, and it was held that he was not the agent of the assignor, quoting as follows: "To have this effect (of a new promise) it is manifest that the payment must be made by the debtor, or by his order, or by an agent fully authorized for the purpose. It is an act of his mind, from which the implied promise to pay the residue of the debt arises. We are of opinion that a payment by an assignee in insolvency is not a payment by the insolvent or his order, within the

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meaning of this rule. The assignee is bound by law to pay the dividend which has been declared, he is the debtor to that amount. The original debtor cannot delay or prevent such payment, if he would. It is not a personal or voluntary act of the insolvent." The settled policy of this court and of the United States Supreme Court, and other courts, to give force and effect to the statute of limitations, in line with what has been the settled policy of the courts of England, at different times, without evasion, is well illustrated in the decision in *Harris v. Clark*, 18 Haw. 569, wherein this court cites *Moore v. Bank of Columbia*, 6 Pet. 86, 92; *Wetzell v. Bussard*, 11 Wheat. 309; *Shepherd v. Thompson*, 122 U. S. 231; and quotes with approval from *Bell v. Morrison*, *supra*, where it was held that if there was no express new promise to pay, but one is to be implied from an acknowledgment, the acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is willing to pay. This last decision of this court cited is out of joint with the decision and reasoning in *Whitcomb v. Whiting*. In my opinion there is more reason for holding that the assignee, under such circumstances, is the agent of the assignor, than to hold that defendant McManus was the agent of Schurmann, under the facts of the case at bar. How can it be reasonably said that payments by McManus, made without the knowledge or consent of Schurmann, were "voluntary payments" made by Schurmann? or that it was an act of his mind? or his assent to such payments? The rule announced in *Whitcomb v. Whiting* was based upon a mere fiction of law, ignored the real relation existing between joint obligors, and presumed knowledge and assent on the part of all for the acts of another, whether known or unknown. This is contrary to the settled policy in this jurisdiction, both prior and subsequent to January 1, 1893, in my opinion. I am also of the opinion that good reasons for not evading the statute in this jurisdiction are set forth and shown in the decisions in *Cowhick v. Shingle*, 5 Wyo. 87, in

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Stubblefield v. McAuliff, 20 Wash. 442, and in many other American authorities.

The opinion of the majority rests solely upon the theory that by section 1 of the Revised Laws which became operative January 1, 1893, the rule laid down in *Whitcomb v. Whiting* was adopted. I cannot take that view. The statute makes certain exceptions, those relating to settled policies, as well as precedents, in this jurisdiction. Even in the United States, where the laws of England were inherited, the common law in its entirety, was not adopted. "The common law of England is not to be taken in all respects to be that of *America*. Our ancestors brought with them from the mother country its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their needs and suitable to their situation and circumstances." (6 Am. & Eng. Enc. of Law 286, and numerous decisions cited in note 3.) Analogous questions have been decided in this jurisdiction. Keeping in mind the settled policy of giving force and effect to the statute of limitations in this jurisdiction and throughout the United States; that pretexts for its evasion are not tolerated; that unless an action is commenced within the statutory period for its limitation, there must be a new promise, express or implied, by the debtor, to which his mind has assented, something voluntarily and consciously done by him evincing an intent to recognize and pay the obligation, and we are assisted in determining whether the legislature in adopting section 1 of the Revised Laws intended to overturn this settled policy, by rulings of this court, and its predecessors, upon other questions involving the principle.

In *Henrique v. Paris*, 10 Haw. 408, speaking of certain principles of the common law, and in passing upon their adoption, or nonadoption by said statute, the court said: "There is not now and here the necessity that there was in England in the middle ages for laws against champerty and maintenance to prevent stirring up of suits for purposes of oppression, nor

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any reason why a landlord should not convey his estate without the consent (attornment) of his tenant. Freedom, rather than restraint of alienation is required under present conditions. The reasons for this rule having ceased, the rule itself should also cease." To the same effect are the decisions in *Mossman v. Hawaiian Government*, 10 Haw. 421, and in *Van Gieson v. Magoon*, 20 Haw. 146.

In *Rooke v. Queen's Hospital*, 12 Haw. 375, the court, at pp. 379, 380, to my mind, gives good reasons why it should now be held that the rule laid down in *Whitcomb v. Whiting* was not adopted, in that the said rule is contrary to our settled policy, out of joint with the times, and not supported by our precedents. The court there, *inter alia*, said: "In England, the country of their origin, rules of property and of construction such as are likely to be involved in cases of this kind, even though they may have grown up under conditions that no longer exist, are adhered to with great rigidity, rules of construction often being given almost the fixity of rules of law. But in the United States the tendency is to reject what are considered rules of property in England if out of joint with the times, and to suffer rules of construction to yield readily to the manifest intention of the testator. * * * Hawaiian legislation, judicial decisions and national usage prior to the taking effect of the statute (Sec. 1. R. L.) in question, January 1, 1893, undoubtedly followed the American tendency towards flexibility and adaptability to present and local conditions, rather than the English example of rigidity. See for example, *Thurston v. Allen*, 8 Haw. 392. There exists even greater reasons for departure from or failure to adopt English technical rules and precedents here than in the United States. And since the enactment of that statute (Sec. 1, R. L.) the previous rejection of certain material parts of a system has been regarded as amounting to a rejection of other parts."

In *Branca v. Makuakane*, 13 Haw. 499, at page 500, is found the following: "The question is whether the technical

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rule of the common law which usually required the use of the word 'heirs,' and allowed no substitute therefor, however clear the intention might be, to carry an estate in fee simple, should be allowed to override the manifest intention of the parties. * * * That rule was a relic of the feudal system and grew up under conditions that no longer exist in England and never existed in these islands as it did in England. It is now regarded as purely technical, and its chief effect seems to be to defeat the intention of the parties. Accordingly it has been modified or repealed by statute in England, the home of its origin, and in nearly all of the States and Territories of the United States." Judge the rule announced in *Whitcomb v. Whiting* by the same standard, and it might well be said of it, that it is *technical*, that its chief effect is to defeat the object, purpose and operation of our statute of limitations; and, that it was repealed in England, the home of its birth, more than half a century ago; and, it has been repudiated in nearly all of the States and Territories of the United States.

Section 1 of the Revised Laws was construed in *Dole v. Gear*, 14 Haw. 554. This court, at page 561, said: "One of the exceptions named in the statute is that the common law shall not apply when it is 'otherwise expressly provided by the Hawaiian * * * laws.' We have just held that the statute that confers jurisdiction 'according to the usage and practice of courts of equity' does not require such usage and practice to be ascertained by reference to decisions at any particular period of time in the past or in England to the exclusion of the United States. Is not this, therefore, a case in which it is 'otherwise expressly provided by Hawaiian Laws' within the meaning of the exception named in the statute adopting the common law? There is much reason to believe that it is. But, assuming that it is not, still we are not bound by the old English rule for the following reasons. The common law consists of principles and not of set rules. It therefore admits of different applications under different conditions. Moreover by the

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terms of our statute it is to be ascertained by American as well as English decisions. In *Morgan v. King*, 30 Barb. 9, the court, in construing a somewhat similar statute, said (at p. 13): 'The adoption of the common law, in the most general terms, by the government of any country, would not necessarily require or admit of an unqualified application of all its rules, without regard to local circumstances, however well settled and generally received those rules might be. Its rules are modified upon its own principles, not in violation of them' and (at p. 14) 'when it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules, or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the *unwritten law* of England; and we have adopted it as a constantly improving science, rather than as an *art*; as a system of *legal logic*, rather than as a *code* of *rules*. In short, in adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed.' See also Bouvier, Tit. Com. Law. In *Sayward v. Carlson*, 1 Wash. St. 29, in construing a similar statute the court said (at p. 40): 'But we do not subscribe to the next proposition, that resort can be had only to the decisions of English courts, or to those of American courts which have followed them, to ascertain what the common law of England is or was, unless the English decisions commend themselves to reason, or have been so long and generally followed that to depart from them would tend to unsettle what has, by 'immemorial and universal usage,' been understood to be settled. The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the storehouse of reason and good sense, declared the 'common law.' But since courts have had an existence in America they

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have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding current English decisions, especially upon questions involving new conditions. Therefore, we have the 'common law' as declared by the highest courts of this, that and the other state, and by the courts of the United States; sometimes varying in each. And we understand, by §1 of the code, that where there are no governing provisions of the written laws, the courts of the late territory, and of this state, are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law; but not that the decisions of the English courts are to be taken blindly and without inquiry as to their reasoning or application to the circumstances.' This court then proceeds to show that when conditions change that the rules of the common law must give way by modification or abrogation.

In my opinion, the decision in *Cross v. Allen*, 141 U. S. 528, should not be followed, for the reason that it is at variance with "our national usage" and not adapted to our circumstances. Moreover, what is said in that decision in regard to Lord Mansfield's rule, is *obiter dictum*, being unnecessary to a decision of the case. That was a suit in equity to foreclose a mortgage given by Cross and wife upon property, some of which belonged to the husband, and some to the wife. Suit was brought after the statutory period had elapsed, the wife had died, and it was sought to remove the bar by certain payments made. The wife was not personally bound, not having signed the note. The court held that the mortgage was a mere incident to the debt, and subsisted as long as the debt did, which is, evidently, the correct rule. The case was evidently decided under the Oregon statute, quoted in the opinion, where it is expressly provided that the statute runs only from the date of the last payment, and the United States Supreme Court must have given to the said statute the same interpretation given to it by the Supreme

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Court of Oregon in *Partlow v. Singer*, 2 Ore. 308, and other Oregon cases.

There is nothing in the record showing that the defendant Schurmann, plaintiff in error, ever acknowledged the existence of the debt, voluntarily made any payment thereon, or promised to pay same, within four years next preceding the commencement of this action. In my opinion the judgment, sought to be reviewed, should be reversed.

IN THE MATTER OF THE APPEAL OF GOO WAN
HOY FROM A RULING OF THE AUDITOR OF THE
TERRITORY OF HAWAII.

HEARD APRIL 27, 28, 1914.

DECIDED JUNE 4, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

STATUTES—Act 52 of the Session Laws of 1913 construed.

The reference in section 3 of Act 52 of the Laws of 1913 to sections 2 and 3 of Act 143 of the Laws of 1911, had the effect of making the provisions of those sections applicable to claims to be paid under the Act of 1913; and held, therefore, that the auditor was justified in refusing to issue warrants for the payment of claims under the later act which had not been examined and approved by the treasurer in accordance with the requirements of the earlier act.

OPINION OF THE JUSTICES BY ROBERTSON, C. J.

This is an appeal from a ruling made by the auditor of the Territory brought by one Goo Wan Hoy upon the representation that on or before the 30th day of June 1911, the appellant, as assignee of certain claimants, presented to the territorial treasurer certain claims, verified by oath, against the Territory, for the repayment of moneys wrongfully collected as merchandise license tax pursuant to the authorization of Act 143 of the Session Laws of 1911; that on the first day of April 1914, he

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presented to the auditor a detailed statement of said claims and demanded that the auditor issue warrants for the payment of said claims under the authority of Act 52 of the Session Laws of 1913; that the auditor refused to issue such warrants; and that there were thirty-four of such claims which aggregated the sum of \$1700. The auditor filed a statement by way of answer in which he set forth, *inter alia*, that except two claims which were paid to the appellant on the day after this appeal was filed, he had refused to pay appellant's claims on the grounds that eight of them had been previously paid to one Smithies, as assignee thereof, and that as to the rest they had not received the approval of the treasurer; that the terms of sections 2 and 3 of the Act of 1911 had not been complied with; and that the fund appropriated by the Act of 1913 was insufficient to pay all the claims presented, therefore under the decision in *Smithies v. Conkling*, 20 Haw. 600, claims should be paid in the order of their presentation, but that the treasurer had not determined the order of presentation of the claims held by the appellant.

The case turns upon the construction of the statute. Act 143 of the Laws of 1911 made an appropriation of money for the purpose of repaying to certain licensees amounts wrongfully collected from them under sections 764 to 768 of the Penal Laws of 1897. Section 2 of that act provided that claimants should present to the treasurer of the Territory within three months from the passage of the act "verified by oath, detailed statements of the amount or amounts paid by them in accordance with the requirements of" said sections of the Penal Laws, "and the treasurer of the Territory shall, after having verified such statements of the amounts so paid, and upon being satisfied that no part thereof has been repaid to such" claimants, repay to them "the amounts paid by them, and shall obtain and file proper receipts for such payments." The act further provided (Sec. 3) that claims not presented on or before June 30, 1911, should be forever barred. The amount appropriated by

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that act being insufficient to pay all the claims presented within the time allowed, the legislature passed Act 52 of the Laws of 1913, making a further appropriation "for the purpose of paying back the amounts collected as license tax under sections 764 to 768 of the Penal Laws of 1897, and claims for which payment were duly presented according to the requirement of Act 143" of the Laws of 1911. The act also provides that claims shall be paid upon warrants issued by the auditor "payable to such persons as have complied with the provisions of sections 2 and 3 of Act 143 of the Session Laws of 1911," and that "such balance of this appropriation as shall be unexpended at the expiration of twelve months after the approval of this act shall lapse." The act was approved on April 4, 1913, and the attorney general contends that as the unexpended balance of the appropriation has lapsed it would be idle, if the appeal could otherwise be sustained, to direct the auditor to draw warrants on the treasurer which the latter could not pay. We find it unnecessary to decide the point.

We think the provision of the third section of the act of 1913, to the effect that claims should be paid upon warrants issued to such persons as had complied with the provisions of sections 2 and 3 of the act of 1911, had the effect of making those provisions applicable to claims to be paid under the act of 1913. In other words the evident intention of the legislature was that in order that any claim could be honored under the later act it must have been verified by oath and presented to the treasurer on or before June 30, 1911; and by that officer examined and found correct. The provision in the 1913 act relating to the issuance of warrants by the auditor merely confirmed the practice followed under the 1911 act, whereby upon the presentation to the auditor of a claim approved by the treasurer the auditor issued his warrant for the amount of the claim. On behalf of the appellant it is argued that as it appears that the legislature at its session of 1913 had before it a list purporting to be a list of claims presented to the treasurer under the

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act of 1911, and remaining unpaid, the aggregate amount of such claims equalling the amount of the appropriation made by the act of 1913, it must have been the intention of the legislature that the claims included in that list should without further examination be paid. Ten of the thirty-four claims held by the appellant were not included in the list furnished to the legislature. We think the conclusion advanced by counsel does not follow from the facts. It cannot be reconciled with the provision in the later act which refers to the provisions of the earlier act the evident purpose of which, in our opinion, was to require a compliance with the requirements of the act of 1911. If the legislature had intended that certain claims should be paid irrespective of whether they had been examined by the treasurer, and without his approval, the reference to the requirements of the 1911 act would not have been made.

The appellant's claims not having been verified or approved by the treasurer the auditor did his duty when he refused to draw warrants in payment of them.

- The ruling of the auditor is sustained.

J. Lightfoot for appellant.

I. M. Stainback, Attorney General, for the auditor.

J. J. BYRNE *v.* DANIEL KALEIKI, DEFENDANT,
INTER-ISLAND STEAM NAVIGATION COMPANY,
LIMITED, GARNISHEE.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED JUNE 1, 1914.

DECIDED JUNE 9, 1914.

ROBERTSON, C. J., WATSON AND QUARLES, JJ.

GARNISHMENT—*seaman's wages*.

The wages of a seaman who has not shipped through a shipping commissioner, but directly employed by the owner of a ves-

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sel engaged in the merchant trade between ports in this Territory, are subject to garnishment. Affirming *Schnack v. Clark*, 21 Haw. 661.

OPINION OF THE COURT BY QUARLES, J.

The appellant, the Inter-Island Steam Navigation Company, Limited, was served with garnishee summons in the district court of Honolulu, as provided by the statute of this Territory, appeared as such garnishee, and answered as follows: "That the defendant is a second mate on the steamer 'Claudine,' hired directly by the Inter-Island S. Nav. Co., and not through a shipping commissioner, and at the time of service of process, it has 3½ days' pay due to defendant, and receives a salary of \$92.00 a month, and is still in its employ. That said steamer 'Claudine' is used by the garnishee in the inter-island coast trade from one island to another." It moved that it be discharged as such garnishee on the ground that the wages of the defendant, as a seaman, are not subject to attachment or garnishment under the provisions of section 4536 Revised Statutes of the United States. This motion was denied, and the defendant having defaulted, judgment was entered against the defendant, and against the garnishee, in favor of the plaintiff for the sum of the debt and costs, amounting in all to the sum of \$92.04, and the garnishee, appellant, was ordered to withhold from the defendant and pay to the plaintiff twenty-five per centum of the wages due to defendant at the time of service of such garnishee summons, and thereafter accruing, until the said judgment should be satisfied. From the judgment so entered the garnishee has appealed directly to this court upon the point of law, whether or not the wages of the defendant, as a seaman, are exempt from attachment or garnishment under the provisions of section 4536 Revised Statutes of the United States. The garnishment process shown by the record is authorized under the statutes of this Territory, and the appeal herein is in all things regular, and vests jurisdiction in this court. The judg-

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ment must be affirmed, unless the contention of the garnishee that the wages of the defendant are exempt from attachment or garnishment by reason of said statute, is correct.

In the case of *Schnack v. Clark*, 21 Haw. 661, this court, recently, after full and careful consideration, passed upon this question in a similar case, and held that the wages of seamen engaged in the coastwise trade, when employed by the master or owner of the vessel, and not through a shipping commissioner, are not exempt from attachment or garnishment by a creditor. After further consideration we see no reason for coming to a different conclusion, and reaffirm the decision in *Schnack v. Clark, supra*. The several acts of Congress relating to the subject-matter, and the authorities deciding this question, both in the affirmative and in the negative, were so fully considered and discussed by this court in *Schnack v. Clark, supra*, that no useful purpose would be subserved by again considering and discussing them here. With a few additional suggestions we will base our decision in this case upon the authority of the decision in *Schnack v. Clark, supra*.

A diversity of opinion has been expressed as to whether the original shipping commissioners' act of June 7, 1892 (17 Stat. L. 262), affected seamen engaged upon vessels in the coastwise trade, or if so, whether or not the act of Congress of June 9, 1874 (18 Stat. L. 64), repealed the original act in so far as seamen engaged upon vessels in the coastwise trade, other than between Atlantic and Pacific coast ports, are concerned. The Supreme Court of the United States in *United States v. The Grace Lothrop*, 95 U. S. 527, 532, held that the original act of June 7, 1872, did not apply to vessels engaged in the coastwise trade except between Atlantic and Pacific coast ports, but said that if there was any doubt on that point that it had been removed by the amendatory act of June 9, 1874, wherein it was provided that none of the provisions of the original act should apply to vessels engaged in the coastwise trade except between the Atlantic and Pacific coasts. This ruling was followed in *United States v. Smith*, 95 U. S. 536. The apparent

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object of the act of June 9, 1874, giving to the language thereof its usual signification, is to take out of the operation of the act of June 7, 1872 (the shipping commissioners' act, within which is included section 4536 Rev. Stat. of the United States), vessels engaged in the coastwise trade other than those engaged in trade between the Atlantic and Pacific coasts, if the same were included at all in the original act. Such was the conclusion of the court in the two cases last cited, and this conclusion is manifestly correct. In *Wilder v. Inter-Island Steam Navigation Co.*, 211 U. S. 239, this question was mentioned as not having been argued, or presented by the assignment of errors, and, therefore, not decided, the court treating the shipping commissioners' act in a general way, and not interpreting that portion of it found in section 4536 Revised Statutes of the United States with reference to subsequent amendatory acts.

Following the legislation by Congress affecting the matter down to the present time we find no act which repeals the act of June 9, 1874, or which expressly, or by intendment, makes the provisions of the original act extend to vessels engaged in coastwise trade other than between Atlantic and Pacific coast ports in so far as the question before us is concerned. The act of June 26, 1884 (23 Stat. L. 53, 60), appears from the title and from the body of the act to apply only to vessels engaged in the foreign carrying trade (trade between Atlantic and Pacific coast ports being treated as foreign), with the exception of those engaged in trade "between the United States and the Dominion of Canada, Newfoundland, the Bermuda Islands, the Bahama Islands, the West Indies, Mexico and Central America." That act does not mention vessels engaged in the coastwise trade other than between the Atlantic and Pacific coasts, nor in terms refer to the amendatory act of June 9, 1874, or refer at all to section 4536 Revised Statutes. The act of June 19, 1886, section 2 (24 Stat. L. 79, 80), authorizes the shipment and discharge of crews on vessels engaged in the coastwise trade, etc., "at the request of the master or owner of such vessel," the fees to be half of the usual fees. This provision is

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permissive only, and we do not see how it affects the question at issue here, where the defendant seaman was not employed through a shipping commissioner, but directly by the owner of the vessel. The last act named was further amended by act of August 19, 1890 (26 Stat. L. 320), so as to make vessels engaged in the coastwise trade, etc., that ship crews through a shipping commissioner, subject to twenty of the sections of the original act incorporated into Title LIII, Revised Statutes of the United States, but did not mention section 4536 included therein. Said act was further amended by act of February 18, 1895 (28 Stat. L. 667), extending the provisions of section 4536 and other sections in said Title LIII, Revised Statutes to vessels engaged in coastwise trade whose crews should be "shipped through a shipping commissioner." This last amendatory act was further amended by act of March 3, 1897 (29 Stat. L. 687, 689), but in no way affecting the question before us. The original act under consideration was again amended by act of December 21, 1898 (30 Stat. L. 755, 764), but only by the fourth and fifth sections, the fourth amending section 4529 Revised Statutes so that a seaman must be paid his wages within two days after the termination of the agreement under which he shipped or when he is discharged, unless he shares in the profits of the cruise or voyage; while the fifth section amends section 4530 Revised Statutes so as to require the payment to every seaman of "one-half part of the wages which shall be due him at every port where such vessel, after the voyage has commenced, shall load or deliver cargo before the voyage is ended unless the contrary be expressly stipulated in the contract; and when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him as provided in section forty-five hundred and twenty-nine of the Revised Statutes." In passing this amendment Congress evidently had under consideration the prior amendatory acts under which seamen engaged upon vessels in the coastwise trade were excluded from the provisions of the shipping commissioners' act except in cases where they shipped through a shipping com-

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missioner, hence, did not intend that the last amendment should affect seamen engaged on vessels in the coastwise trade upon either one of our coasts who do not ship, or have not shipped, through a shipping commissioner. Another matter to be considered is that the defendant seaman was employed under a contract which provided for payment of his salary at stated times bringing this case within the proviso of the last mentioned statute, as no other inference than that his wages were payable monthly, and not by "cruise" or "voyage," arises from the language of the answer of the appellant.

The judgment of the district court of Honolulu appealed from is affirmed, with costs to the appellee.

Thompson, Wilder, Milverton & Lymer for plaintiff.

Smith, Warren, Hemenway & Sutton for garnishee.

LEE LUN v. WILLIAM HENRY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 26, 1914.

DECIDED JUNE 16, 1914.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF QUARLES, J.

BANKRUPTCY—Act of 1898—jurisdiction to determine debtor's claim for exemptions.

The adjustment of the debtor's claim for exemptions is a matter which pertains to the administration of the bankrupt estate over which the court in which those proceedings are pending has exclusive jurisdiction.

SAME—trover for property claimed as exempt.

As a predicate to the right to maintain trover for the conversion of property claimed as exempt the bankrupt must first show that the property with respect to which he seeks to prosecute his action has been determined by the court in which he was adjudicated a bankrupt to be exempt property.

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EXEMPTIONS—*burden of proof.*

The burden of proving the exemption is on the party claiming it and his right thereto must be shown by conclusive proof.

OPINION OF THE COURT BY WATSON, J.

Trover for the conversion of three sewing machines claimed by plaintiff as exempt under section 1831 of the Revised Laws of the Territory. The taking was admitted. Defendant justified as high sheriff of the Territory of Hawaii under a writ of attachment against the plaintiff, the validity of which writ was not questioned. The parties were at issue to the court, trial by jury being waived, and upon the close of the plaintiff's case the defendant moved for a nonsuit on the grounds (1) that the court was without jurisdiction in that the title to said property was and is in the United States district court sitting in bankruptcy, and all questions concerning the same are within the exclusive jurisdiction of that court; (2) that the plaintiff had not proved any value of any article; (3) that there was no evidence that said articles were exempt from levy and sale under execution. The court granted the motion, expressly predicating its ruling upon the first ground stated in the motion. To the order granting the motion for nonsuit, the judgment entered thereon and the written decision of the court, thereafter filed, plaintiff duly excepted. The transcript of evidence is not made a part of the bill of exceptions but the facts, as expressly found by the court below and incorporated in the decision, which is made a part of the record here, are as follows: "That the plaintiff was on the 19th day of August, 1913, and had been for many years prior thereto, a tailor in Honolulu, that on said day, the defendant who was then, and now is, the High Sheriff of the Territory, levied upon and took into his possession, under a writ of attachment, about the validity of which writ no question is raised, certain chattels belonging to the plaintiff, among which chattels were three Singer sewing machines of the value of \$25.00 each. When this attachment

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was levied, the defendant had in his possession four sewing machines, which were used in his business, as a tailor. These machines were, in the main, operated by journeymen tailors, but the defendant would, at times, use one of them himself in his business, and the evidence is that he could not carry on his business, as it was usually conducted, at a profit which would afford him a living, with less than that number of machines. The defendant, proceeding upon the theory that only one machine was exempt to the plaintiff, levied upon and took into his possession, as before stated, the other three. It appears that on November 8th, 1913, and on the day following, said machines still being in the custody of the defendant, the plaintiff made demand upon him for the return of the same, which demand was refused. The demand, so made, was based upon the ground that the machines in question were exempt as the tools or implements of a mechanic or artisan, namely, the trade of a tailor, under Par. 3, Sec. 1831, Rev. Laws. It further appears that on the 20th day of August, following the levy of said attachment, the plaintiff was adjudged a voluntary bankrupt. In his schedules, which were filed with his petition in bankruptcy, he made no claim of exemption for any of the machines herein mentioned. It does appear, however, and is not disputed, that at the first meeting of the bankrupt's (plaintiff's) creditors, held in conformity with the practice in bankruptcy, permission was asked of the Referee, before whom said meeting was held, for leave to amend the schedules (Schedule B. (5) 1) by making a claim of exemption for all of said machines, on the ground before stated, which leave was granted, the amendment being then and there made in pencil. Thereafter, at the suggestion of the Referee, a formal motion in writing was made, asking that the schedules be amended in the particular referred to, and this having been done, the Referee, with the consent of the Trustee in Bankruptcy, made a formal order in writing on the 22nd day of October, 1913, 'that

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said Schedule B (5) 1, do stand amended as prayed in the foregoing motion.' It also appears, that after demand had been made upon the defendant for the return of said machines, the Trustee in Bankruptcy, upon his own motion, made an order setting apart one of said four machines to plaintiff and denying the claim made in his said schedule, as amended, to exemption of the other three. It was admitted that no steps had been taken by plaintiff to have said machines set apart to him as exempt, in the bankruptcy proceedings, and that no appeal had been prosecuted by him from said order of the Trustee."

The sole question presented by the exceptions is whether the lower court erred in granting the defendant's motion for a nonsuit. Counsel for appellant concedes in his brief that unless the sewing machines, the conversion of which is sued for, were and are, in fact, exempt the plaintiff's case must fall. He thereupon cites numerous authorities in support of his contention that such articles were and are exempt and argues that a determination of that question is essential. That point was not passed upon by the lower court, and under the exceptions, as presented in this court, is not properly before us. The only question raised by the exceptions is whether or not the court below erred in granting the motion for nonsuit. In other words, the important question as presented by the exceptions is, not whether, in fact, the sewing machines are exempt under the territorial law, but whether the lower court erred in holding that it was without jurisdiction to pass on that question. Appellant's counsel relies on the case of *Lockwood v. Exchange Bank*, 190 U. S. 294, as supporting his contention that this action may be maintained. That case is controlling authority to the effect that title to exempt property of a bankrupt under the Bankruptcy Act of 1898 does not pass to the trustee and remains in the bankrupt, but that leaves open the very point here in issue, to wit, the manner in which the bankrupt's exemptions shall be determined and set apart and what court has jurisdiction of such a proceeding.

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The *Lockwood* case has been often cited by the bankruptcy courts in construing the Bankruptcy Act of 1898 and the effect of the holding in that case deduced by the federal courts has been thus stated: In *In re Strickland*, 167 Fed. 867, 869, the court says: "In *Lockwood v. Exchange Bank*, 190 U. S. 294 * * * it was held that a trustee in bankruptcy acquires no title to exempted property save that which is incident and necessary to his duties to the estate and to the bankrupt in setting it aside." In *In re Soper*, 173 Fed. 116, 117, it is said: "The trustee was in possession of such articles prior to the time of making his report, but upon setting them aside as exempt the title to them was no longer in the estate of the bankrupt. *Lockwood v. Exchange Bank*, 190 U. S. 294. The trustee was entitled to possession only until he ascertained that such articles were exempt and thereupon it became his duty to deliver such articles to the bankrupt." We think the above excerpts constitute a correct exposition of the holding in the *Lockwood* case, where, on page 299, after having set out the provisions of the Bankruptcy Act of 1898 relating to exemptions, the manner of determining the claims of bankrupts thereto, etc., the court said: "The fact that the Act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside and thus exclude it from the assets of the bankrupt estate to be administered affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in unambiguous language declares shall not pass from the bankrupt or become part of the bankruptcy assets." In the *Friedrich* case, decided in the circuit court of appeals of the seventh circuit and reported in 100 Federal Reporter, on page 284, Circuit Judge Jenkins, speaking for the court (p. 285), says: "That Act (Bankruptcy Act, 1898, section 7, subd. 8) provides that a voluntary bankrupt shall with his petition file 'a claim for such exemptions as he may be entitled to' * * * and provides by sec. 47, subd. 11 that the trustees shall

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'set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointments.' The act thus clearly indicates that the severance in fact of exempt property from the general estate is to be made by the trustee, not by the debtor, and the value of that so severed is to be determined in the first instance by the trustee, not by the debtor. The bankrupt law allows to debtors the exemptions provided by the law, but the manner in which the exemptions are to be claimed, set apart and awarded is regulated by the bankrupt act." "While a bankrupt's right to exemptions must be deduced from the state law, it can be made available only in the manner prescribed by the bankruptcy act of July 1, 1898, etc." *Lipman v. Stein*, 134 Fed. 235. "While the exemption right in the goods in hand depends upon the statutes of Washington, as has already been said, the manner of claiming such exemptions and of setting apart and awarding them is regulated by the bankruptcy act." *In re Gerber*, 186 Fed. 693, 699, citing *In re Friedrich*, *supra*; *In re Mayer*, 108 Fed. 599. In the *Mayer case*, last cited, the court held that title to all property vests in the trustee *sub modo*, subject to such exemptions as shall be finally awarded, and in *In re Mastbaum*, Fed. Cas. No. 9265, it was held that the exemption under the fourteenth section of the Bankruptcy Act of 1867 is not allowable until the bankrupt has passed his last examination. "The exemptions provided by the law of the State are allowed by the bankruptcy act, but the manner of claiming such exemptions and setting apart and awarding them is regulated by the bankruptcy act." *In re Kane*, 127 Fed. 552, 553. "The bankruptcy court has exclusive jurisdiction to determine the claims of the bankrupt to exemptions." *In re McCrary Bros.*, 169 Fed. 485, 486; *McGahan v. Anderson*, 113 Fed. 115; *In re Overstreet*, 2 Am. B. R. 486. "The general grant of power relative to the setting off of exemptions will be found in §2 (11). When the exemption has been set apart by the trustee and he has reported it to the court for its approval, and when

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approved and the bankrupt's right to it has been finally determined, the property embraced in the exemption ceases to be a part of the assets to be administered by the court in connection with the bankrupt's estate." Collier on Bankruptcy, 6 ed., 93. Where property claimed to be exempt is attached in a state court, such property may be held under the attachment until it is determined in bankruptcy proceedings what part of the attached property has passed to the trustee freed from the claims of the exemption. *Jewett v. Huffman*, 13 Am. B. R. 738. "The bankruptcy court as a necessity must alone deal with the exemptions of the bankrupt. If any other tribunal was to intervene to determine this question it would be the exercise of a jurisdiction which might result in a conflict of authority and deprive the bankrupt court of its rightful power to speedily determine all questions of law and of right arising under the bankrupt act, which was clearly the intention of Congress when it enacted the law." *McGahan v. Anderson*, *supra*, 117. In *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786 (writ of error dismissed, 1905, 196 U. S. 93), the supreme court of Washington said: "The bankrupt is obligated to schedule all of his property in his petition in bankruptcy,—that which he claims as exempt as well as that to which he makes no such claim,—and it is the duty of the bankrupt court to determine and set apart to him the exemptions allowed by law. Clearly the property is subjected to the jurisdiction of the court, no matter in whom the legal title thereto may be said to rest. * * * The clause of the bankruptcy act vesting in the trustee the title to all the bankrupt's estate 'except in so far as it is to property which is exempt,' was intended, it seems to us, to do away with the necessity of a conveyance from the bankrupt to the trustee and nothing more. It was not intended to deny to the bankruptcy court the power to make valid orders with reference to all or any of the bankrupt's property, whatever may be its character, or whether the title may be in the bankrupt or the officer of the court."

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From a review of the authorities cited we are of the opinion that the adjustment of the debtor's claim for exemptions is a matter which pertains to the administration of the bankrupt estate over which the court in which those proceedings are pending has exclusive jurisdiction, and until the bankrupt has established what, if any, of the property belongs to him as exempt, freed from the claim of his trustee in bankruptcy, he is in no position to maintain this action. As a predicate to the exercise of any such right he must first show that the property, with respect to which he seeks to prosecute his action, has been determined by the competent tribunal (the court in which he was adjudicated a bankrupt) to be exempt property. In arriving at this conclusion we are not unmindful of the fact that there are reported cases, decided by state courts of last resort, holding that under the Bankruptcy Act of 1867 a bankrupt may maintain an action for the recovery of exempt property in specie or for damages for wrongs done in respect to it, whether the same has been set apart by the trustee or not. *Wilkinson v. Wait*, 44 Vt. 508; *Winn v. Morse*, 59 N. H. 210. In the last mentioned case the court says: "It (exempt property) does not pass to the assignee and the title of the bankrupt is in no way affected or impaired by the neglect or failure of the assignee to designate and set apart the exempted property. The assignee has no control over it and it is immaterial whether it has been set apart by him or not." We cannot assent to the doctrine announced in that case as applicable to the case at bar, under the Bankruptcy Act of 1898, as in our opinion it is not in accord with the terms of the act or its spirit and intent and it is not in harmony with federal decisions construing the act of 1898 as it relates to the setting apart and determination of a bankrupt's right to exemptions.

The only point raised by the exceptions being that the lower court erred in granting the motion for nonsuit and entering a judgment of nonsuit thereon, the judgment will have to be affirmed if any of the grounds of the motion are well taken;

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that is, if the conclusion of the lower court was correct it must be affirmed, irrespective of its reasons. *Colburn v. Holt*, 19 Haw. 65. By section 1832 of the Revised Laws it is provided that "No property mentioned in section 1831 shall be exempt from attachment for, nor from execution issued upon a judgment recovered for the purchase price thereof, or upon a judgment of foreclosure of a mortgage thereon, nor for taxes or fines or any debt due the Territory of Hawaii." It does not appear whether or not the sewing machines, the conversion of which is sued for, were seized by the defendant under an attachment issued in a suit for the recovery of the purchase price thereof or whether or not the attachment was issued in an action for any taxes or fines or any debt due the Territory of Hawaii. The burden of proving the exemption was on the appellant, the plaintiff in the court below. 1 Loveland on Bankruptcy 896; *In re Turnbull*, 106 Fed. 667; *McGahan v. Anderson*, 113 Fed. 119. And his right to the exemption must be shown by conclusive proof. *In re Rainwater*, 191 Fed. 738. "The state law (of Virginia) allows every resident householder to hold exempt his real or personal estate to the value of two thousand dollars, provided that said exemption shall not extend to any execution, order or other process issued on any judgment for, *inter alia*, the purchase price of said estate or any part thereof. * * * Under the Virginia homestead law the exemption cannot be had in any property against a demand for the purchase price thereof. * * * He (the bankrupt) is presumed to know the law and to know that he cannot exempt any property as against the demand for the purchase price. He must, therefore, be treated as having impliedly asserted that every article claimed has been paid for. * * * The bankrupt has the affirmative of the issue." *In re Campbell*, 124 Fed. 417, 421. In this case the plaintiff failed to sustain the burden of proving that the sewing machines were not seized under an attachment for the purchase price thereof, and in our opinion the motion

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for nonsuit might well have been granted on the third ground stated, "that there was no evidence that said articles were exempt from levy and sale under execution."

Exceptions overruled.

A. S. Humphreys for plaintiff.

L. Andrews for defendant.

NETTIE L. SCOTT v. E. N. PILIPO AND E. K. PILIPO.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JUNE 1, 1914.

DECIDED JUNE 16, 1914.

ROBERTSON, C. J., WATSON AND QUARLES, JJ.

PLEADING—*bill in equity—exhibits.*

Where a record or other writing constitutes a substantial part of the claim upon which a complainant seeks relief it may be pleaded by describing it and averring its substance and legal effect, or it may be referred to in the bill and a copy annexed as an exhibit, but a judicial record merely referred to with a prayer that it be judicially noticed as if set out in full is not thereby made a part of the bill of complaint.

LANDLORD AND TENANT—*failure of lessor to deliver possession—relief in equity.*

The failure of the lessor to give the lessee possession, or the inability of the latter to obtain possession of the demised premises, is available by way of defense in an action at law to recover rent irrespective of the presence or absence of fraud on the lessor's part. Such an action, or the enforcement of a judgment obtained therein, will not be enjoined where the defense was not presented through the choice or fault of the defendant in the action unmixed with any fraud, fault or negligence on the part of the plaintiff, nor, under such circumstances, will equity compel the return of money paid in satisfaction of such a judgment.

SAME—*tenants in common—possession—rent.*

Where the lessor and lessee are also tenants in common an ouster of the lessee by the lessor would constitute a defense to

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a claim for rent, but the mere retention of possession by the lessor would not constitute an ouster of the lessee nor terminate the obligation of the latter to pay rent.

SAME—claim for rent voluntarily paid—laches.

Complainant's laches will defeat a claim in equity for the return of rent voluntarily paid under a lease where, if complainant ever had any ground for making such claim, over fourteen years have elapsed since it arose.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an interlocutory appeal allowed by the circuit judge from an order overruling a demurrer to a bill in equity for the cancellation of a lease and other relief. In some respects the bill of complaint is prolix and contains matter which is objectionable from the standpoint of good pleading, while in other respects it is lacking in definite statements on important matters, but no objection to its form has been urged in this court. The substance of its principal averments will be stated. A copy of the lease sought to be cancelled is attached as an exhibit to the bill.

Some of the averments of the bill refer to certain previous litigation between the parties, namely, a suit for the partition of the demised premises, and an action for the recovery of rent reserved in the lease. In addition to reciting certain of the proceedings had in those cases substantially the following reference was made to each, "The records of said action are hereby referred to and by reference incorporated herein, and complainant prays that the same be judicially noticed as if set out in full in this complaint," and the husband of the complainant who has been permitted to appear for his wife seems to have understood that by such reference the exhibits, including the record in a prior equity suit between the parties, and a transcript of testimony, as well as the records proper of those cases, were incorporated in and made part of the bill of complaint. In *Scott v. Pilipo*, 21 Haw. 766, in the absence of objection, and the questions being simple, we overlooked a like

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defect in the pleading and considered the records referred to. The course taken in that case is not to be regarded as a precedent and we are not disposed to follow it in this case. Where a record or other writing constitutes a substantial part of the claim upon which a complainant seeks relief it may be pleaded by describing it and averring its substance and legal effect (16 Cyc. 236; *de Souza v. Soares*, 21 Haw. 330) or it may be referred to in the bill and a copy annexed as an exhibit (16 Cyc. 237; *Bias v. Vickers*, 27 W. Va. 456, 461; *Harvey v. Kelly*, 41 Miss. 490) while a writing pleaded incidentally with a view to offering it in evidence at the hearing need not be so set forth (Cyc., *supra*). Furthermore, the evidence in a case, documentary or oral, does not constitute a part of the record except where it is made such in a proper manner for the purpose of securing a review of the judgment or decree in the particular case. 3 Cyc. 57; *Kalamakee v. Wharton*, 19 Haw. 472; *Clifford v. Hudson County Court*, 61 N. J. L. 493. The averments of the bill in so far as they state the nature and effect of the cases referred to and set forth some of the proceedings had therein may properly be considered, but further than that those records, or the evidence, cannot be regarded as having been made parts of the bill.

The bill prays that the lease be cancelled; that the respondents be enjoined from enforcing a verdict for \$464 obtained against the complainant in 1902 in an action for rent brought in the circuit court of the third circuit, and from prosecuting any claim for rent accruing subsequent to September 1, 1905; that the complainant be relieved from paying further rent; that complainant have judgment against the respondents for various sums aggregating the sum of \$4343 for rents paid under the lease to March 1, 1900, the amount of the judgment recovered by the respondents in the last law action, a sum paid for taxes upon the demised premises, interest on said sums, also costs of court and attorney's fees paid by the complainant in the previous litigation. The respondents demurred to the bill upon

several grounds, those pressed in this court being that the bill discloses laches on complainant's part, that complainant has an adequate remedy at law, that complainant has not come into court with clean hands and has not offered to do equity, that complainant has accepted, ratified and elected to stand by the lease, and that as to any defenses she interposed or might have set up to the claim for rent up to September 1905, they are *res judicata*, the judgment in the law action having determined the rights of the parties. The demurrer went to the whole bill as well as to parts of it, and the part of the prayer relating to the monetary claims. Apart from the averments of the bill we may take judicial notice of the fact that on June 19, 1913, this court affirmed the judgment for plaintiffs in the action brought by the respondents against the complainant to recover rent to September 1, 1905, and the reasons therefor as stated in the opinion. *Pilipo v. Scott*, 21 Haw. 609. Also that on December 11, 1913, on an interlocutory appeal from a decree overruling a demurrer to a bill for an injunction brought by the complainant to restrain the respondents from enforcing the judgment in the above mentioned case, the cause was remanded to the circuit judge with instructions to sustain the demurrer. *Scott v. Pilipo, supra*. The bill in that case also prayed for the cancellation of the lease but the court found no ground upon which to grant such relief.

It is averred in the bill in the present case that on August 21, 1894, the respondents leased to the complainant an undivided interest in the hui land of Holualoa, Hawaii, for the term of thirty years beginning September 1, 1894, the rental being six dollars per annum per "share" for 53 "shâres" until the expiration of a lease of a portion of the land then held by one Gouveia, and thereafter at the rate of fifteen dollars per share. This lease was construed in the case reported in 21 Haw. 609 where other of its main provisions are set forth. As pointed out in the opinion in that case the effect of the lease was to create a tenancy in common between the lessee and Miss

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Pilipo as well as the other shareholders in the hui, the complainant's interest in the land being 53|353, excepting, however, certain specified portions, and subject to the lease to Gouveia, and the occupancy of certain other parcels "by members of the hui either as house-lots or agricultural purposes in places heretofore planted by them." It is also averred in the bill that the lease to Gouveia, made in 1887 for the term of twenty years, the rent having been paid in advance for the full term, expired in September 1907; that it was the custom of the hui to make allotments for use in severalty to each of the respective cotenants in the part of the hui land adjoining the upper government road which was suitable for agricultural purposes; that prior to the execution of the lease Miss Pilipo pointed out to complainant's agent the part which, with the acquiescence of the other cotenants, had been allotted for use to the lessors and upon which the lessee was to enter; that the president of the hui likewise pointed out the part which had been allotted to the Pilipos; that the part so designated was a portion of a tract of about 71 acres of agricultural land lying between the upper government road and the Kailua road; that the complainant obtained leases from three other shareholders who were occupying portions of said tract; that upon the execution of the lease the complainant essayed to take possession of the whole of the 71 acre tract by entering upon a portion or portions of it, clearing off the guava growth, completing the boundary fences and otherwise exercising possession; that the complainant voluntarily paid rent amounting to \$1590 covering a period of more than four years upon the expectation that she would be "restored to" possession" by the partition proceedings which had been instituted; that the lessee continued in the belief that she had acquired actual possession of the whole tract until she was apprised by the decision of this court that her possession was ineffectual as against the persons who were in prior actual occupancy of three small pieces of the land from which the complainant claimed to have been evicted; that thereafter the

respondents made leases to other persons of portions of the 71 acre tract; that the respondents continued to occupy portions thereof, the entire interest represented by the demised 53 shares being wholly occupied; that complainant was completely defeated in her attempt to enter or secure possession of any part of the lands represented by the demised shares; that there was no other part of the hui land upon which complainant could have entered without interfering with the prescribed rights set out in the lease of other members of the hui; that at the time of the execution of the lease the lessors fraudulently concealed from the lessee the fact that all the tangible rights and interests represented by the demised 53 shares were in the possession of others with no obligation to surrender the same when wanted; that the fraud of concealment thus perpetrated at the inception of the lease was further augmented by every demand for and payment of rent; that there was a renewal of the fraud in filing the verified complaint in the said action at law, alleging that the lessee had entered into possession; that the fraud was adhered to throughout the long trial of said action and only confessed at its very close.

These averments are largely a repetition of those upon which the injunction against the enforcement of the judgment in the law action was sought. 21 Haw. 766. They are now repeated with other averments with the view to restraining the further prosecution of the action for rent in the circuit court of the third circuit, to the return of the amount paid in satisfaction of the judgment in the last law action, and the recovery of the amounts paid for costs of court and attorney's fees in the previous litigation. The reasoning of the opinion of this court in the last equity case applies here. It was there held that in so far as the failure of the lessors to deliver possession to the lessee was a violation of duty on their part it would absolve the lessee from her obligation to pay rent, that the defense was available in the action at law for the recovery of the rent, and that the enforcement of the judgment would not be restrained upon a

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ground which was available as a defense in the action but which was not presented through the choice or fault of the defendant in the action unmixed with any fraud, fault or negligence on the part of the plaintiffs. 21 Haw. 766. In the ordinary relation of lessor and lessee the refusal of the former to put the latter in possession or the inability of the tenant without fault on his part to obtain possession would, under our practice, constitute a defense to an action to recover rent, and where the lessor and lessee are also tenants in common doubtless an ouster of the lessee by the lessor would have the same effect. But as tenants in common hold by unity of possession, each being equally entitled to the use and benefit of the common property, the mere retention of possession by the lessor would not constitute an ouster of the lessee or terminate the obligation of the latter to pay rent. The impracticability of using land owned in common for residence or agricultural purposes is apparent, hence the practice of Hawaiian hui by custom or written regulation to provide for the occupation in severalty of portions of the common property. It is undoubtedly competent from a legal standpoint for the cotenants to make such an arrangement. *Lui v. Kaleikini*, 10 Haw. 391. A valid tenancy might very well be created with reference to a parcel of land so held in severalty subject to the termination of the landlord's right to so hold by reason of the lawful abrogation of the custom or regulation, or upon a partition of the premises. Assuming, without deciding, that notwithstanding the lease in question was of an undivided interest in the land, the lessee, under the circumstances alleged, had the right to demand and receive from the lessors the exclusive possession of a part of the land, and that the failure of the lessors to give possession according to such demand, if made, would have relieved the lessee from the payment of rent, the allegation in the present bill of fraud on the part of Miss Pilipo in pointing out a portion of the land as being available for exclusive occupancy adds nothing to the situation as it was presented by the previous bill. The failure of the lessors to deliver

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possession or the inability of the lessee to obtain possession as a defense in the action for rent did not depend on the presence or absence of fraud. The defense was equally available whether such failure on the part of the lessors or inability on the part of the lessee resulted from the lessors' fraud or from some act or condition not tainted with fraud. We hold, therefore, that as to this part of the bill the complainant's remedy, if any, was at law.

The averments to the effect that the lessors' fraud was "re-enacted" in the first equity suit and "renewed" in the second law action are inconsistent with the averments to the effect that the complainant did in fact enter upon the land, and cleared portions of it, completed the boundary fences, and otherwise exercised acts of possession.

Although it is averred that the complainant continued in the alleged mistaken belief that she was in possession of the entire tract of 71 acres, there is nothing in the bill to show that she was ignorant of the facts, and the averments in connection with the complainant's inability to get possession of the particular part of the land which she desired and expected to possess show that she became aware of that fact soon after the execution of the lease, yet she continued to pay the rent for about four years. If the complainant ever had any ground for claiming the return of the money so voluntarily paid the statute of limitations has long since run against the claim and complainant's laches would defeat the claim as now made, more than fourteen years having elapsed since it first arose.

The manner in which the land was occupied and used by the members of the hui, and the terms of the lease between the parties to this litigation, and the fact that Mrs. Scott was a shareholder in the hui in her own right as well as the tenant of several other shareholders gave rise to a complicated situation. The condition should have been simplified by the partition of the land if that has been completed. The averments of the bill with respect to this phase of the case do not make the matter

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clear. It is averred that in the year 1896 the complainant and her husband, being owners in their own right of shares in the hui, instituted a suit for the partition of the land; that in said suit commissioners were appointed to report on the feasibility of partitioning the land; that the commissioners made a report recommending the partitioning in kind of parts of the land and the sale of other parts; that on June 13, 1899, a decree was entered in accordance with the recommendations of the report, and one Wall was appointed commissioner to effectuate the decree; that in 1903 the commissioner sold the upper forest belt which was included in the Gouveia lease, the sale being confirmed by the court; that on July 5, 1905, the belt of kula land lying between a strip adjoining the beach and the agricultural belt was sold and the sale confirmed; that during the year 1904 the strip adjoining the beach and the agricultural belt makai of the upper road were surveyed and partitioned among the shareholders in severalty; and that said partition was later confirmed. But it does not appear what was done with reference to the strip of agricultural land which lies between the upper road and the forest land which was sold; nor does it appear what disposition was made of the proceeds of the sales which were made; nor whether the lessee received any portion of or interest in any of such proceeds of sale; nor does it appear whether the lessee has been prevented from entering upon any of the land which has been set off to the respondents. At the time the lease was executed the parties contemplated the partitioning of the premises and in the absence of any provision in either the lease or the decree of partition defining their respective rights, the tenancy presumably would attach to that part of the land set off to the lessors unless because of the sale of substantial portions of the land and the distribution of the proceeds of sale the conditions have so changed that the lessee would in equity be entitled to have the lease cancelled. From certain statements made in course of the argument in this court, which however were of matters not set forth in the bill, it would

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seem that the complainant may be entitled to either the cancellation of the lease or at least an adjustment and reduction of the rent. It is not shown, however, that the partition of the land has been substantially completed and it is impossible to say, upon the averments of the bill, what relief, if any, the changed conditions may require.

The order appealed from is reversed and the case is remanded to the circuit judge with instructions to sustain the demurrer.

M. F. Scott for complainant.

E. K. Aiu and *N. W. Aluli* for respondents.

L. WEINZHEIMER v. C. D. LUFKIN.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

SUBMITTED JUNE 15, 1914.

DECIDED JUNE 24, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

STATUTES—*effect of amendment—amendment of statute previously amended.*

Where a statute amends a prior act or section of a statute "so as to read as follows," making changes in or additions to the original enactment, and setting forth the law as so amended, those provisions of the original enactment which are retained are regarded as having been in force from the time of the original enactment and continued in operation by the amendatory statute, the omitted parts being repealed, and new provisions becoming operative as of the time when the amendatory act took effect. A second amendatory act need not purport to amend the first amendatory act, but will be effective if it refers to the original enactment only.

MORTGAGES—*foreclosure by sale—publication of notice.*

Under R. L. Sec. 2161, as amended by Act 108, Laws of 1911, it is sufficient to publish mortgage foreclosure notices in the English language only.

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OPINION OF THE JUSTICES BY ROBERTSON, C.J.

This is a submission upon an agreed statement of facts by which it is shown that the plaintiff purchased certain parcels of land situate at Lahaina, county of Maui, at a public sale held in foreclosure of a certain mortgage executed by one Ka-haulelio and his wife to the defendant, as trustee. The mortgage authorized the mortgagee, in the event of default on the part of the mortgagor, to "foreclose this mortgage by suit in equity, or sell the mortgaged property according to any one or more of the methods of foreclosure provided by the laws of the Territory of Hawaii, either separately or concurrently," and to "execute and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds" of conveyance. The deed from the defendant, trustee, to the plaintiff, reciting the foreclosure of the mortgage by virtue of the power of sale, and the payment of the consideration of \$1260, contained a covenant on the part of the grantor that "at the sale and disposition of said properties, in all matters and things, said mortgage foreclosure and sale hereinabove referred to were conducted fairly, honestly, in accordance with law and the terms of the mortgage foreclosed." It is further shown that the mortgagee's notice of intention to foreclose the mortgage and sell the mortgaged property, though it was in proper form and published the number of times required by the statute, was published in the English language only. It is with reference to this last point that the controversy has arisen. The plaintiff claims that the statute requires that mortgage foreclosure notices be published in both the Hawaiian and English languages; that because in this case the notice was not given in both languages the statute was not complied with; that the deed given to him was not "a good and sufficient deed;" and that he is entitled, upon executing a conveyance to the defendant, which he offers to do, to recover from the defendant the amount of the purchase price.

Chapter 139 of the Revised Laws, relating to the foreclosure of mortgages, as enacted in 1905, included sections 2161 to

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2165 which apply to foreclosure under power of sale. Section 2161 reads as follows:

"Sec. 2161. Notice of foreclosure; affidavit after sale. When a power of sale is contained in a mortgage, the mortgagee, or any person having his estate therein, or authorized by such power to act in the premises, may, upon a breach of the condition, give notice of his intention to foreclose such mortgage, by publication of such notice in the Hawaiian and English languages for a period of three consecutive weeks, before advertising the mortgaged property for sale; and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage; and he shall within thirty days after selling the property in pursuance of the power, file a copy of the notice of sale and his affidavit setting forth his acts in the premises fully and particularly in the office of the registrar of conveyances, in Honolulu. The affidavit and copy of the notice shall be recorded by the registrar with a notice of reference thereto in the margin of the record of the mortgage deed if recorded in his office."

The section was amended by Act 59 of the Session Laws of 1907, entitled "An Act Relating to Foreclosure of Mortgages, Amending Section 2161 of the Revised Laws," and reading as follows:

"Section 2161. Notice of foreclosure; affidavit after sale. When a power of sale is contained in a mortgage, the mortgagee, or any person having his estate therein, or authorized by such power to act in the premises, may, upon a breach of the condition, give notice of his intention to foreclose such mortgage, by publication of such notice in the Hawaiian and English languages once in each of three successive weeks, the first publication to be not less than twenty-one days before the day of sale, in a newspaper published either in the county in which the mortgaged property lies or in Honolulu and having a circulation in such county; and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage; and he shall within thirty days after selling the property in pursuance of the power, file a copy of the notice of sale and his affidavit setting forth his acts in the premises fully and particularly in the office of the registrar of convey-

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ances, in Honolulu. The affidavit and copy of the notice shall be recorded by the registrar with a notice of reference thereto in the margin of the record of the mortgage deed if recorded in his office."

This was followed by the enactment of Act 108 of the Session Laws of 1911, entitled "An Act to Amend Section 2161 of the Revised Laws of Hawaii, Relating to Notices of Foreclosure of Mortgages Under Power of Sale," and reading as follows:

"Section 1. Section 2161 of the Revised Laws of Hawaii is hereby amended by striking out in the sixth line of said section the words 'the Hawaiian and,' and by substituting for the word 'languages,' in the same line the word 'language.'"

Counsel for the plaintiff contend that section 2161 was repealed by the act of 1907; that at the time of the passage of the act of 1911 "there was no longer any section 2161 of the Revised Laws;" that the act of 1911 "purported to amend and did amend no law standing as law on the statute books;" and that Act 59 of the Laws of 1907, being unamended, is in full effect, and it requires the publication of foreclosure notices in both the English and Hawaiian languages.

The fact that the act of 1911 provided merely for the striking out of a few words from the original enactment and the substitution of another word prompts the making of two preliminary observations. The act is not open to the objection which would lie against it in a jurisdiction having a constitutional provision to the effect that in amendatory statutes the act or section amended must be set out in full. On the other hand, the act, being in the form shown, is not complete in itself and cannot stand as an independent enactment. With reference to the act of 1907 the case at bar does not present the situation of a statute covering the whole ground of a subject in a manner inconsistent with and repugnant to the provisions of an earlier statute, and thus repealing the earlier act by implication. Where the whole ground is not covered by the later statute and there is only a partial repugnancy the repeal will

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operate only *pro tanto* to the extent of the repugnancy. *United States v. Tynen*, 11 Wall. 88, 92; *Pana v. Bowler*, 107 U. S. 529, 538.

The title of the act of 1911 is free from objection, except as it is involved in the general question, and the intent of the legislature is perfectly clear. Is the contention of plaintiff's counsel sound? In support of the contention are cited cases which are to be found in the notes to 1 Lewis' Southerland Statutory Construction, Sec. 233; 36 Cyc. 1055; and 26 Am. & Eng. Enc. Law (2d ed.) 704. In Indiana, in a long line of cases, it has been held that a statute or section which has been once amended cannot again be the subject of amendment, but the section as amended must be amended, the theory being that the first amendatory act having set forth the statute as amended in full the original enactment was thereby repealed *in toto*. Though in *Sage v. State*, 127 Ind. 15, 23, the court cited with approval the case of *Alexander v. State*, 9 Ind. 337, where, referring to an act which amended a certain section of the Revised Statutes "to read as follows," the amended section being in the same words as the original with some addition, the court said "It is clear that this was not a repeal. It was not so designed. It was simply an amendment." The cases of *Louisville etc. R. Co. v. City of East St. Louis*, 134 Ill. 656, and *State v. Benton*, 33 Neb. 823, cited in plaintiff's brief, have been explained and their authority restricted in later cases in their respective jurisdictions. See *Melrose Park v. Dunnebecke*, 210 Ill. 422; *Patton v. People*, 229 Ill. 512; and *State v. City of Wahoo*, 62 Neb. 40.

We believe the view which will better carry out the intent of the legislature is that which is sustained by the weight of authority and of reason, namely, that where an act amends a prior act or section of a statute "so as to read as follows," making changes in or additions to the original enactment, and setting forth the law as so amended, those provisions of the original enactment which are retained are regarded as having been

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in force from the time of the original enactment and continued in operation by the amendatory statute, the omitted parts being repealed and new provisions becoming operative as of the time when the amendatory act took effect. *McDougald v. N. Y. Life Ins. Co.* 146 Fed. 674, 678; *Estate of Prime*, 136 N. Y. 347, 353; *Carruthers v. Commissioners of Madison County*, 6 Mont. 482; *St. Paul etc. R. Co. v. Broulette*, 65 Minn. 367, 371; *Blake v. Brackett*, 47 Me. 28, 32; *Goodbar v. Memphis*, 113 Tenn. 20, 34; *Fitzgerald v. Lewis*, 164 Mass. 495; *Territory v. Ruval*, 9 Ariz. 415; *Fletcher v. Prather*, 102 Cal. 413, 418. We hold, therefore, that section 2161 of the Revised Laws was not repealed by the amendatory act of 1907 but that that section continued to exist under its original number as amended. From this it necessarily follows that the act of 1911 properly referred to the section by its original number and was effective to amend it a second time. *People v. Pritchard*, 21 Mich. 235, 241; *White v. Inebriates' Home*, 141 N. Y. 123, 127; *Exp. Segars*, 32 Tex. Cr. 553, 556; *Harper v. State* (Ala.) 19 So. 857; *Columbia Wire Co. v. Boyce*, 104 Fed. 172; *Minnesota etc. Improvement Co. v. Billings*, 111 Fed. 972, 978; *State v. City of Wahoo, supra*; *Melrose Park v. Dunnebecke, supra*. "The rule of law is that when a section of a statute is amended or displaced by a later substituted act, and still later an act is passed which in terms purports to amend the original section, referring to it by number, such last amendment applies to any intermediate amendment of or substitution for the original section; such intermediate amendment or substitute to be regarded as if it had always been a part of or in place of the original section." *State v. Blake*, 241 Mo. 100, 105.

Since the enactment of Act 108 of the Laws of 1911 it has been sufficient to publish mortgage foreclosure notices in the English language only. The mortgagee having complied with the statute in this respect his deed is held to be good and suffi-

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cient, and the plaintiff is not entitled to recover the amount of the purchase price.

Judgment may be entered for the defendant with costs.

Thompson, Wilder, Milverton & Lymer and *B. S. Ulrich* for plaintiff.

D. H. Case and *E. Vincent* for defendant.

JIUICHIRO NISHIHARA v. TOKU NISHIHARA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JUNE 15, 1914.

DECIDED JUNE 25, 1914.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF QUARLES, J.

DIVORCE—desertion.

Where a husband sues his wife for a divorce on the ground of desertion and it appears from the evidence that such desertion was wilful and utter for a period of more than one year, *held*, that the bringing of another woman to this Territory and the mere claiming by the husband of such other woman as his wife, subsequent to the desertion, unaccompanied by proof of any illicit or improper relations with such woman, is not sufficient ground for refusing a decree to the deserted husband.

SAME—review of facts on appeal—conflicting evidence.

In cases turning wholly or largely upon the credibility of witnesses and the weight of testimony much weight is accorded to the findings of the trial judge who saw the witnesses and heard them testify, the general rule being that a decree granting or refusing a divorce on evidence which is conflicting will not be disturbed.

OPINION OF THE COURT BY WATSON, J.

The complainant husband obtained a decree of divorce from his wife on the ground of wilful and utter desertion for the term of one year and the defendant wife appeals. It is alleged

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that the parties were married in the Empire of Japan in February 1902; that thereafter, to wit, in May 1903, they arrived at Honolulu in the Territory of Hawaii and that they lived together continuously thereafter in said Honolulu until August 1908, when the wife, presumably with the consent of the husband, went to the Empire of Japan where she remained until September 1912, when she returned to Honolulu and again took up her abode with her husband; that after living with him for about two weeks, on or about the 30th day of September 1912, without cause or excuse, she utterly and wilfully deserted and abandoned her husband and refused to live and cohabit with him; that such desertion has been wilful and continued up to the time of the filing of the libel, to wit, February 20, 1914. There is no dispute as to the fact that defendant left complainant on or about September 30, 1912, as alleged in the libel, and that she has not lived or cohabited with him since that time. As to the cause and manner of her leaving, however, there is a sharp conflict in the evidence. Complainant testified that on the return of defendant from Japan in September 1912, she said she did not like to work in his house and left; that he asked her not to leave and told her that he wanted her there but she refused to remain and went away; that he had given her no reason for leaving him. K. Sinoichi, the brother-in-law of complainant, called as a witness on his behalf, testified that in September 1912, shortly after the return of the defendant from Japan, she told him that while in Japan she had heard that her husband was keeping another woman in Honolulu; that she would like to have separate work away from her husband and that she wanted to leave him. Witness told her that there were no grounds for such a report in regard to complainant, and defendant answered "under those circumstances all right;" that defendant spoke to witness about the same matter the following day and altogether had two or three conversations with him in that regard; that a short time afterwards defendant left complainant. Sinoichi Kanu, wife of the witness last referred to

and a sister of complainant, also testified that defendant told her in September 1912, shortly after her return from Japan, that she wanted separate work away from her husband; that witness had six or seven conversations with defendant and defendant gave as her reason for wanting to leave complainant that she had heard that her husband had formed an attachment for a sweetheart in Honolulu. Witness further testified that prior to the time defendant went away she had never seen any trouble between complainant and defendant and had never seen complainant mistreat defendant in any way. George M. Yamada, who so far as the record shows was a disinterested witness, called on behalf of complainant, testified that he knew complainant and defendant and had known them for many years; was friendly with both parties; that shortly after defendant left complainant, acting as a "go-between," he saw the defendant at the house of one Kobayashi on King street, in Honolulu, and tried to get defendant to go back to her husband, "but she said under no circumstances would she return to her husband * * * she was in a very jealous disposition then * * * she accused the husband of having some illicit connection with a woman who was a waitress in a restaurant * * * by the name of Otaka;" the husband was present at the time and denied this. Defendant, sworn as a witness in her own behalf, while admitting having had a conversation with Yamada at the house of Kobayashi, denied that he had asked her to return to her husband, and stated that the only conversation held between them related to a certain newspaper publication which appeared with respect to the affairs of herself and husband; defendant testified that she never refused to go back to her husband; she further denied having told the Sinoichis that she wanted to go away to work; she testified that Mrs. Sinoichi "came to me and asked me and says 'he is in this kind of work here and it is necessary for him to have his wife here and I am going to Japan to get a geisha girl to be his wife and won't you submit to that for a couple of years,' but I said I don't want that; refused it;

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so I went to him (complainant) and told him." She further testified in substance that her husband, the complainant, then ordered her to leave. "He told me to get out; that is the reason I left * * * he told me to go and I left." Mrs. Sinoichi, called in rebuttal, denied absolutely the conversation testified to by defendant. At the conclusion of the evidence the circuit judge in deciding the case said: "In a case like this, where the testimony is absolutely conflicting, the court is bound to take the story which appeals to him the more and which he thinks is established by the evidence most. It appears to the court that this woman left the man on account of jealousy. The court is therefore bound to grant the divorce. The prayer of the libellant will be granted," etc. From the remarks of the judge in granting the divorce it is evident that he believed the testimony of the complainant and his witnesses and disbelieved the evidence of defendant that she had been driven away by complainant. It appears by the admission of complainant's counsel, made in open court, that on the 16th day of February, 1914 (four days prior to the filing of the libel in this case), a woman named Fusa Nishihara applied to the U. S. immigration authorities for admission on the ground that she was the wife of the complainant Jiuichiro Nishihara; that complainant appeared at the immigration station and claimed she was his wife; that some protest was made that he was not divorced yet from the defendant and the woman Fusa was paroled in the custody of Mr. Ozawa (a member of the bar of this court); and that said woman is now in the Territory of Hawaii. Supplementing this admission, complainant on cross-examination admitted that the woman Fusa had come to this country for the purpose of marrying him and that she had arrived at the port of Honolulu claiming to be his wife, but the immigration officials had told him he could not marry her until he obtained a divorce, and that after he obtained his divorce he intended to marry her. There is no evidence of any improper or illicit relations between complainant and this woman Fusa, but counsel for the

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defendant argues that the arrival of the woman, claiming to be the wife of complainant, and plaintiff's statement to the immigration authorities that she was his wife corroborates the testimony of defendant that she was driven from home by the complainant who at that time entertained the plan of supplanting her as his wife by another. In rebuttal counsel for complainant offered to prove by a witness called for that purpose that there was a divorce between complainant and defendant under the laws of Japan; that in May 1913 complainant *bona fide* believed this divorce to have been granted and to be in force and effect and that he, complainant, under that belief acted in good faith in bringing the woman Fusa to this country. To this testimony there was objection on the ground that it was incompetent, irrelevant and immaterial and not rebuttal, which objection was sustained and the evidence was refused. Counsel for appellant contends that where the conduct of the husband is such as to cause the wife to leave her husband and subsequent conduct shows that his intention is to get rid of her as soon as possible, using the excuse that she voluntarily left him, a divorce will not be granted. He cites numerous cases upholding his contention and argues that the judgment of the circuit judge should be reversed and the divorce refused. The authorities referred to meet with our entire approval, but they are only applicable in the event the evidence of the defendant is accepted as true, and as already stated the circuit judge, who heard the case and no doubt gave due consideration to the conflicting evidence, did not believe the evidence of defendant but did believe the evidence of complainant and his witnesses as to the cause and manner of defendant's leaving complainant's home. There is no evidence of any misconduct on the part of the husband or any ill-treatment of his wife by him prior to the time of the desertion that would justify her in the desertion, and for that reason, in our opinion, the authorities cited by counsel are not applicable. As already stated, there was no attempt to prove any improper relations between complainant

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and the woman Fusa, but even had adultery between them been shown, occurring subsequent to the desertion, we are of the opinion that under a statute of this Territory it would not constitute a defense to the action brought by complainant against defendant on the ground of desertion. Section 2233 of the Revised Laws provides, *inter alia*, "No divorce for the cause of adultery shall be granted: * * * Fourth. Where there is reasonable cause to believe that the libelant has been guilty of any act which would entitle the defendant, if innocent, to a divorce. The fourth ground for refusing a decree above mentioned, shall not be applied to an application for a divorce for any other cause than that of adultery," etc. In *Pahoa* (w) v. *Haupu* (k), 4 Haw. 158, this court had occasion to construe and pass upon the application of the statute above quoted. Mr. Justice Judd, speaking for the court, after referring to the statutory provisions above quoted, on page 160 said: "This court in *Kalua v. Kamaea*, January Term, 1878 (4 Haw. 58), held that in a libel for divorce on the ground of desertion recrimination of adultery would be a good defense and justify the refusing of a divorce. To prevent refusals of divorce on like grounds after this decision had been made the act of 1878 was passed by the legislature which allows a suitor to obtain a divorce for the desertion of the other party to the marriage contract though he himself be guilty of adultery subsequently. * * * The legislature has the authority to pass laws regulating the marriage relations and to declare what may and what may not be grounds for dissolving it, and also what defenses may be interposed as grounds for the court refusing to dissolve the relation. This is a pure question of policy * * * and the court cannot venture to substitute its own judgment for that which the legislature has thus exercised in a matter within the scope of their constitutional powers." The desertion of complainant by defendant took place, according to the undisputed testimony, on or about September 30, 1912, and assuming such

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desertion to have been wilful and utter, in the view taken by the circuit judge, after the statutory period of one year, to wit, on September 30, 1913, complainant was entitled to maintain his action for divorce. The woman Fusa came into the Territory, claiming to be the wife of complainant, on February 16, 1914, some months after the statutory period had elapsed and after complainant's right of action for a divorce had accrued. Inasmuch as under the statute and the authority of *Pahoa v. Haupu, supra*, recrimination of adultery subsequent to the desertion would not be a good defense, we can but hold that the mere claiming by the complainant of the woman Fusa as his wife would not justify the court in refusing a decree to the complainant in this case. "Where a statutory ground of divorce exists the court has no power arbitrarily to deny a divorce." 14 Cyc. 578, and cases cited. While it is true that under the present law (Act 22, S. L. 1903) divorce decrees are "reviewed upon appeal and the entire testimony is examined as in appeals in equity suits, * * * in cases depending wholly or largely upon the credibility of witnesses and the weight of testimony much weight is accorded to the findings of the trial judge who saw the witnesses and heard them testify." *de Coito v. de Coito*, 21 Haw. 339, 342. In this case the determining issue is whether defendant wilfully deserted and abandoned complainant, as testified by complainant and other witnesses whose testimony has been referred to above, or whether defendant was ordered to leave the marital abode by complainant and left in pursuance of such order, as testified to by her. On this issue the circuit judge, who heard the case and had the witnesses before him, found in favor of complainant "that this woman (defendant) left the man on account of jealousy," which, so far as the record shows, was at that time without foundation. In our opinion the preponderance of the evidence sustains this finding and we do not feel that we would be justified in reversing the same. The general rule is that "A decree granting or refusing a di-

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voiced on evidence which is conflicting will not be disturbed.”
14 Cyc. 735.

The decree appealed from is affirmed.

G. A. Davis (A. K. Ozawa with him on the brief) for complainant.

L. Andrews for defendant.

CHARLES J. SCHOENING, FRED P. ROSECRANS,
AND DAN T. CAREY, CO-PARTNERS UNDER THE
FIRM NAME OF C. J. SCHOENING & COMPANY,
v. WILLIAM MINER, DEFENDANT, CHARLES
WILCOX, AUDITOR OF THE COUNTY OF MAUI,
T. H., GARNISHEE.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

ARGUED JUNE 12, 1914.

DECIDED JUNE 26, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

PARTNERSHIP—*publication of notice.*

A partnership, duly registered, is not incapacitated from suing to recover upon an account for goods sold by it by reason of its failure to publish notice of the partnership as required by statute.

ACTION—*splitting cause—waiver.*

Plaintiffs sued in the district court for a portion only of an account claimed to be due; the case was dismissed on a technical motion without an adjudication upon its merits: Held, under the circumstances not to be a waiver of the portion of the account omitted.

DISMISSAL AND NONSUIT—*motion to dismiss as to part only.*

A motion to dismiss an action upon account, as to some items thereof, on the ground that plaintiff had waived same, is properly denied.

IB.—*proof as to part of cause of action.*

A motion for nonsuit in an action upon account is properly

Schoening & Co. v. Miner, 22 Haw. 196.

denied where the evidence tends to prove some of the items of the account.

STATUTES—necessity of determining validity.

When the validity of a statute is questioned the same will not be determined by the court unless such determination is necessary to a decision of the case then before the court.

OPINION OF THE COURT BY QUARLES, J.

The plaintiffs, a copartnership consisting of three persons, commenced their action in assumpsit in the circuit court of the second circuit to recover a balance of \$334.95 alleged to be due upon account for gasoline, etc., sold to the defendant, and repairs made for him upon an automobile. The complaint contains two counts, the first upon a book account and the second declaring upon an account stated. To the complaint plaintiffs attached a bill of particulars showing the items of debit and credit. The defendant's answer is a general denial. The case was tried by the court, jury waived, and judgment was rendered in favor of the plaintiffs for the full amount demanded with costs. The case comes to this court on exceptions.

The first exception is to the action of the court in sustaining the objection of the plaintiffs to the following question asked the plaintiff Schoening while testifying as a witness: "Did you publish a notice in the newspapers of this county to the effect that Charles J. Schoening, Fred P. Rosecrans and Dan T. Carey were co-partners and doing business under the firm name of C. J. Schoening & Company?" upon the ground that the question is immaterial. The evidence theretofore introduced showed that plaintiffs had registered their partnership as required by section 2653, R. L. The object of the question evidently was to show that the plaintiffs had not given the notice required by section 2655, R. L., as amended by Act 29, S. L. 1907. It is argued upon the part of the defendant that the publication of such notice is a prerequisite to the plaintiffs' capacity to sue and unless the notice required by the last named statute has been published in English and Hawaiian the re-

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quired number of times that the plaintiffs cannot maintain this action. These statutes are a part of chapter 162, R. L., and section 2658 in said chapter provides the only penalty attached to noncompliance with the provisions as to registration notice, etc., i. e., that each partner shall severally and individually be liable for the partnership debts; that it is not necessary for a creditor to sue all of the partners and that each of the partners is liable for a penalty not exceeding five dollars for each day while such default shall continue. It will be seen by a reading of the statutes that it was not the intention of the legislature to make a partnership which did not comply with their provisions illegal, but to prescribe the penalties named, and no other. To hold that the partnership cannot sue to recover a debt due it would be equivalent to the court adding another penalty to those prescribed by the legislature. This would be extending the terms of the statute,—something that the court cannot do. *Territory v. Ah Goon*, 22 Haw. 31. The right of one member of an unregistered partnership to sue his copartner for the purpose of restraining him from collecting the partnership assets, contrary to their agreement, was held in the case of *Wilder v. Bradford*, 11 Haw. 563, where it was said that the partnership being for a lawful purpose, failure to register did not make it unlawful. This exception must be overruled.

It developed in the evidence that the plaintiffs had commenced in the district court of Wailuku, prior to the commencement of the present action, two different actions upon the account sued upon in which the account was intentionally split by leaving out items to the extent of \$39.35, the same being the items in the account subsequent to the date, July 31, 1912. The first one of these actions was dismissed for the reason that the complaint and summons were not fastened together. The second was dismissed by the district court on the idea that the attorneys' commissions and costs increased the amount sued for to more than \$300, and, therefore, that the district court did not have jurisdiction. At the trial of this cause in the circuit court

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the defendant moved that the case be dismissed as to the \$39.35 of the account which is omitted from the actions brought in the district court on the ground that suing on the account and leaving out items claimed to be due waived the cause of action as to such items. This motion was denied and defendant excepted, the exception being number two in defendant's bill of exceptions. In the case of *Volcano Stables v. Hayashi*, 13 Haw. 695, and in *Lewers & Cooke v. Redhouse*, 14 Haw. 290, this court held that the plaintiff might demand judgment for only a portion of the amount due so as to bring the case within the jurisdiction of a district court if it shall be done *bona fide*. The first case was upon a bond, the other upon a book account. In *Phillips v. Lun Chong Co.*, 14 Haw. 297, the plaintiffs split a book account and brought two suits, each for a portion of the amount claimed, in the district court. The first action went to trial and judgment was given for the plaintiffs. In the second action the defendant did not plead waiver by alleging and proving the splitting of the cause of action nor did it claim that the bringing of the first action, for a portion of the account only, waived the remainder of the account, but raised this question on appeal. On appeal it was held that splitting a cause of action waived the remainder of it and that that was a defense which must be proven to enable the defendant to take advantage of it. In the case at bar, if either of the actions brought in the district court had gone to trial on its merits and proceeded to judgment, the plaintiffs would be deemed to have waived the cause of action as to the \$39.35 and this could have been shown by the defendant as a defense to that portion of the cause of action. The motion to dismiss the action as to that portion of the account not embraced in the action brought in the district court was properly denied. It is not proper during a trial to move to dismiss a portion of a cause of action on the ground that a defense thereto exists. In our opinion, neither of the suits in the district court having been tried, but both dismissed as aforesaid, the plaintiffs were not estopped from suing in the circuit court

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for the full amount of the account and it was not a defense thereto as to said portion (\$39.35) to show that the two actions had been commenced in the district court, as there had been no adjudication there. A dismissal for want of jurisdiction, or on technical grounds, without a trial upon the merits, does not constitute an adjudication. This exception must be overruled.

It developed in the evidence that plaintiffs did business under a license to conduct a garage; that they did repair work upon motor cars; and sold, for the use of motor cars, grease, oil, gasoline, fixtures or new parts; and sold such articles to any one wanting them, whether the purchaser had repair work done in plaintiffs' garage or not. At the close of plaintiffs' evidence defendant moved for a nonsuit upon the grounds, (1) that plaintiffs were doing business as a merchant without a merchandise license; (2) that the evidence did not tend to prove an account stated; (3) that the evidence did not prove delivery of all the goods, wares and merchandise claimed to have been sold to defendant by plaintiffs. This motion was denied and the action of the court in this regard is the basis of exception number three. The defendant introduced no evidence. A careful study of the record convinces us that the evidence was sufficient to show, *prima facie*, a sale and delivery of the goods named in the bill of particulars attached to the plaintiffs' complaint. The evidence tends to show that Mr. Schoening sold and delivered a large part of the goods; that Mr. Carey, another of the plaintiffs, sold and delivered other articles; and that the other articles were sold and delivered by employees of the plaintiffs; that in each instance a slip showing the transaction was made, and, in the evening of the same day, generally, entries in the books of account were made from such slips, occasionally, the entry being made a day or two later. The court, at the request of the parties, appointed a commissioner to examine the slips and books, who reported that the slips corresponded with the entries in the books, and bill of particulars, and which fact was practically admitted by counsel for defendant at the trial.

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The evidence tending to show an account stated is unsatisfactory. Mr. Schoening testified that he presented bills from time to time to the defendant; that sometimes defendant would make a payment which would be credited; at other times he would ask for further time, never disputing the bills. But just what bills were presented was not shown. All the circumstances tended to show an indebtedness upon account, as per the bill of particulars; and that the goods therein charged were delivered. We now come to the consideration of the first ground of the motion for nonsuit, i. e., that the plaintiffs were doing business as merchants without a merchandise license. The evidence shows clearly that plaintiffs at the time of the transactions involved had a license to conduct a "garage;" that they had no merchandise license; that they were selling only the articles of merchandise needed in the operation and repair of motor cars, and sold the same in connection with their repair business, and as a part of operating their "garage." It was contended by the defendant that selling such articles was not a part of the garage business, but the sale of goods, wares and merchandise, requiring a separate or "merchandise" license, and that as plaintiffs did not have such a license the sale was void and made in contravention of the statute, and on this ground the motion for nonsuit should have been granted. On behalf of the plaintiffs it is contended, first, that the sale of goods by plaintiffs to defendant mentioned and set forth in the bill of particulars is a necessary part of conducting a garage; second, that the account being in part for repairs upon the automobile of the defendant the motion for nonsuit was properly denied even should it be held that the sale of the gasoline, etc., was not necessarily a part of the garage business, a portion of the account being for repair work and free from the objection that it was an illegal transaction; third, that Act 96 S. L. 1907, providing for a merchandise license, entitled "An Act to amend Chapter 102 of the Revised Laws of Hawaii by adding thereto ten Sections to be known as Sections 1379A, 1418A, 1418B, 1418C, 1418D,

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1418E, 1418F, 1418G, 1418H, and 1418I," does not express in its title the subject of the act as is required by section 45 of the Organic Act creating the Territory of Hawaii, and is therefore void; that the defendant having pleaded the general issue, and failed to give notice with his answer that he would rely upon the illegality of the transactions, as required by a rule of the second circuit court, could not be heard upon the question of the illegality of the sale of the goods named in the bill of particulars. Several interesting questions are thus presented, but in our opinion it will not be necessary to discuss all of them. A consideration of the contention of the plaintiffs that the rule of court mentioned precludes the defendant from questioning the illegality of the sale of the goods by the plaintiffs raises the further question as to whether this court should take judicial notice of the existence and subject-matter of the alleged rule, the same not being in the record before us. Without deciding the question, we deem it proper to suggest that it has been held, on appeal, that the appellate court will not take judicial notice of a rule of the trial court, where the rule has not been incorporated into and made a part of the record. (*Cutter v. Caruthers*, 48 Cal. 178; *Scott v. Scott*, 17 Md. 78; *Kindel v. Le Bert*, 23 Col. 390; *Cornelison v. Foushee*, 101 Ky. 257.) No rules of the circuit court of the second judicial circuit have been approved by this court since the approval of Act 40 S. L. 1913, amending section 1659 R. L. authorizing circuit court judges to make rules regulating the practice, etc., such rules to be approved by this court. It would seem that rules made by a judge of a circuit court, and approved by this court, should be judicially noticed by this court.

The objection urged by the plaintiffs in their supplementary brief as to the validity of Act 96 S. L. 1907, is evidently an afterthought, as the record does not show that it was raised in the circuit court, and the question was not mentioned in plaintiffs' original brief in this court. We have concluded that, following the rule so well established, that courts will not pass

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upon the validity of a statute in any case unless it is necessary to a decision of the case so to do, that we can dispose of the third exception without deciding the validity or invalidity of said statute; without deciding what goods the plaintiffs can, or cannot sell, under their license to conduct a garage; and without determining whether one selling goods, wares and merchandise without a license may or may not recover upon account for the sale price or value of such goods, for the reason that a portion of the account sued upon was for labor and repairs upon the automobile of the defendant made by the plaintiffs. A motion for a nonsuit should be denied where suit is brought upon account and there is more than a scintilla of evidence to prove some of the items to which no valid objection has been made. The motion for nonsuit was properly denied upon this ground, hence, the third exception must be overruled. It is unnecessary to pass upon the other questions urged in favor of this exception.

The fourth exception challenges the correctness of the judgment. There is no exception in the record to the decision of the court upon which the judgment is based. It has been held by this court that in a jury waived case the decision of the court takes the place of a verdict, hence this exception, which goes to the judgment only, does not question the decision, and only raises the question as to the form of the judgment, which plaintiffs have not questioned nor discussed either in briefs or oral argument. "The decision in a case tried without a jury is analogous to the verdict in a case tried with a jury, and an objection that a decision was contrary to the law or the evidence can be made in this court only when an exception to the decision has been noted in the trial court." *Nahaolelua v. Heen*, 20 Haw. 613. We therefore hold that this exception cannot be sustained.

Exceptions overruled.

E. R. Bevins for plaintiffs.

E. Vincent (D. H. Case with him on the brief) for defendant.

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TERRITORY OF HAWAII *v.* MINNIE KAAIKAULA.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED JUNE 29, 1914.

DECIDED JULY 2, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CRIMINAL LAW—*vulgar language.*

Language used in a public place is vulgar, within the meaning of section 3188 R. L., which offends a sense of modesty and decency, and is calculated to cause a breach of the peace.

OPINION OF THE COURT BY QUARLES, J.

The defendant was convicted in the district court on the charge of using vulgar, profane and obscene language in a public place in violation of section 3188 R. L., was fined five dollars without costs, and has appealed to this court on the question of law whether the words "you big fat Buffalo, you damn son of a bitch," addressed by one woman to another, during the course of a quarrel, constitute an offense under the statute. The statute forbids the use of "vulgar, profane or obscene language * * * in any public place." No question as to duplicity in the complaint has been raised, and therefore it may be regarded that only one offense has been charged. (*Swearingen v. United States*, 161 U. S. 446.) The question calls for an interpretation of the statute.

The words involved are defined by Webster, in part, as follows: Vulgar: low, coarse, offensive to good taste or refined feelings. Obscene: filthy, offensive to chastity or modesty. Profane: treating sacred things with contempt; disrespect, irreverence. Bitch: "The female of the canine kind * * *; opprobriously, a woman, especially a lewd woman."

In libel and slander suits it has been held that the word "bitch," when applied to a woman, does not necessarily import whoredom in any of its forms. (*Schurick v. Kollman*, 50 Ind.

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336; *K..... v. H.....*, 20 Wis. 252, 257; *Robertson v. Edelstein*, 104 Wis. 440, 442; *Craig v. Pyles* (Ky.), 39 S. W. 33.) Under a statute which made it a misdemeanor to use "obscene and vulgar language in the presence of a female" it was held not an offense to say in the presence of a woman, "you are a G—d d—n s—n of a b—h;" that said words "are coarse and profane, opprobrious and abusive, but they are not obscene and vulgar." (*Shields v. State* (Ga.), 16 S. E. 66.) Under section 3893 Rev. Stat. U. S. as amended, forbidding the mailing of "obscene, lewd and lascivious" matter, it has repeatedly been held that the intent of Congress was to prevent sending through the mails such matter as tends to excite impure and unchaste thoughts, and not to prohibit such as is merely coarse and vulgar. But our statute is directed against language that is vulgar as well as that which is obscene and profane. Our statute is intended to protect modesty from that which is indecent; to prevent the use of language in public places which will shock the sensibilities and tend to cause breaches of the peace whether vulgar, profane or obscene. Language like that used by the defendant tends to bring about breaches of the peace and was probably used for that purpose. In the case of *Republic v. Ben*, 10 Haw. 278, the language used was similar to that used here, the name of Deity being also used, thus introducing an element of profanity not found here. The court in that case held the language to be both profane and obscene. Tested by the definitions given, the language used, to say the least, is vulgar; it is low, coarse and offensive to modesty and violates the sense of decency which every man and woman should possess; it was not spoken in jest, but in the heat of a war of words, seemingly with the intent to offend and degrade the party to whom it was addressed. As divine vengeance was not invoked, the language cannot be said to be profane. In the sense that it does offend modesty and a sense of decency, it is not only vulgar, but may be said to be obscene. The statute was intended to protect persons from language of the kind used and to sub-

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serve the peace by preventing in public places the use of language which tends to cause breaches of the peace. We are unable to say that the language used is not vulgar within the meaning and intent of the statute.

Judgment affirmed.

A. M. Brown, *Second Deputy City and County Attorney*,
for the Territory.

A. S. Humphreys for defendant.

JOHN STOCKWELL v. INTER-ISLAND STEAM NAVI-
GATION COMPANY, LIMITED, AN HAWAIIAN
CORPORATION.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 23, 1914.

DECIDED JULY 3, 1914.

ROBERTSON, C.J., AND WATSON, J.

JUDGMENT—*nonsuit*.

A judgment of nonsuit is no bar to another action for the same cause. *Vivas v. Aswan*, 11 Haw. 282.

SAME—*nonsuit—res adjudicata*.

A judgment of nonsuit is not an adjudication on the merits but leaves the parties in the same condition, so far as the cause of action is concerned, as though no action had been instituted, and hence cannot constitute *res adjudicata*.

OPINION OF THE COURT BY WATSON, J.

Action on the case to recover damages for personal injuries. Defendant pleaded (1) the general issue and (2) a judgment of nonsuit entered in a former suit upon the same cause of action by the plaintiff against the defendant. Demurrer to the second plea that the same is insufficient in law to constitute a defense or bar to plaintiff's cause of action. Joinder in demur-

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rer and the lower court reserved for the consideration of this court the question, should the demurrer be sustained. Mr. Justice Quarles being disqualified, it was stipulated in writing between the parties that the case should be submitted for decision to the two remaining justices and that their decision should be binding on the parties.

The question thus presented, whether or not a judgment of nonsuit constitutes a bar to another action between the same parties for the same cause of action, was passed on by this court in the case of *Vivas v. Aswan*, 11 Haw. 282. There the court held unqualifiedly that a judgment of nonsuit is no bar to another action for the same cause, citing among other authorities *Morgan v. Bliss*, 2 Mass. 111; *Bridge v. Sumner*, 1 Pick. 371; *Ensign v. Bartholomew*, 1 Met. 274. Defendant contends that the decision in the *Aswan* case should not be regarded as controlling in the case at bar for the reason that it did not appear in that case that the judgment of nonsuit was granted on the merits, whereas in the instant case the plea in bar alleges that the judgment of nonsuit "was on the merits of said former action." This court having adopted in the *Aswan* case the rule laid down by the Massachusetts cases, and that rule having become the general understanding of the profession in this jurisdiction, we should hesitate to depart therefrom unless it clearly appeared that the rule thus announced is erroneous. In at least two of the cases relied on by the court in arriving at its conclusion in the *Aswan* case the rule is expressly declared that a judgment rendered on a nonsuit on the merits is no bar to a future action for the same cause. *Morgan v. Bliss*, *supra*; *Bridge v. Sumner*, *supra*. The doctrine that a judgment of nonsuit is no bar to another action for the same cause is in harmony with the overwhelming weight of authority. 1 Freeman on Judgments, Sec. 261. Mr. Black, in his work on Judgments, 2 ed., Sec. 699, says: "It is a settled and inflexible rule that a judgment of nonsuit is not a judgment upon the merits and therefore is no bar to another suit upon the same cause of ac-

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tion." And again in section 703 he says: "A judgment of dismissal may also be asked for on the trial at the conclusion of the plaintiff's evidence in chief. And the granting of such a motion can have no greater effect upon the cause of action than an involuntary nonsuit entered at the same stage. * * * Hence, the cases hold that the dismissal by the court of an action at law, while the same is on trial and before its final submission, upon the ground that plaintiff has failed to establish his cause of action, is not a final determination on the merits, and therefore not pleadable against another action for the same cause." In 24 A. & E. Enc. Law, 2 ed. 801, this same rule is stated as follows: "It is well settled in the United States that a judgment of nonsuit or in the nature of a nonsuit is not an adjudication upon the merits, but leaves the parties in the same condition, so far as the cause of action is concerned, as though no action had ever been instituted, and hence cannot constitute *res judicata*." The doctrine thus announced in the text is supplemented by a long list of authorities cited in the foot note which we deem it unnecessary to reproduce here. For later cases supporting the same doctrine see 4 Suppl. A. & E. Enc. Law 613, note 1. See also *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121; *Gardner v. Michigan etc. R. R.*, 150 U. S. 356; case notes *Lea v. Lea*, 96 Am. Dec. 778; *Cartin v. South Bound R. R. Co.*, 49 Am. St. Rep. 831. It has been held that a judgment of nonsuit, even on an agreed statement of facts, cannot be pleaded in bar of a new suit. *Derby v. Jacques*, Fed. Cas. No. 3817; *Homer v. Brown*, 16 How. (U. S.) 354. "The difference between a compulsory nonsuit and a directed verdict for the defendant is matter of form rather than of substance, except that in case of the former a new action may be brought, while in the case of a directed verdict and judgment thereon the action is ended unless a new trial is granted upon motion or on appeal." *Board of Com'rs. v. Home Sav. Bank*, 200 Fed. 28, 35, and cases cited; *Oscanyan v. Arms Co.*, 103 U. S. 261, 264. In support of his contention that a judgment of involuntary

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nonsuit rendered on the merits is a bar to a subsequent suit upon the same cause of action, counsel for the defendant relies strongly upon the case of *Ordway v. Boston & Maine R. R.*, 69 N. H. 429. In 24 A. & E. Enc. Law, 2 ed. 801, *supra*, the *Ordway* case is the single case cited as at variance with the general rule laid down in the text that a nonsuit is not a bar to another action for the same cause. From a careful reading of that case we can but believe that the court, if not controlled, was largely influenced by the statute of the State of New Hampshire then in force, referred to on page 436, it being conceded by the court (p. 431) that by the doctrine of authorities "it is a settled and inflexible rule of law that a judgment of nonsuit is not a judgment upon the merits, and therefore it is no bar to another suit upon the same cause of action." We are of the opinion that the rule laid down in the *Aswan* case, *supra*, is correct and in accord with the great weight of authority. For that reason the reserved question should be answered in the affirmative, and it is so ordered.

L. Andrews for plaintiff.

E. W. Sutton (Smith, Warren, Hemenway & Sutton and J. W. Cathcart on the brief) for defendant.

DANIEL KAMAHU v. JAMES BICKNELL, AUDITOR
OF THE CITY AND COUNTY OF HONOLULU.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

SUBMITTED JULY 23, 1914.

DECIDED AUGUST 1, 1914.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF WATSON, J.

MUNICIPAL CORPORATIONS—civil service commission—rules—powers.

The authority to make rules and regulations to govern the selection and appointment of persons to be employed in the police

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and fire departments of the city and county of Honolulu, granted to the commission by Act 51, Session Laws 1913, does not authorize the commission to make a rule requiring competitive examinations for the promotion of persons in the service, and a rule to that effect adopted by the commission is void.

OFFICERS—promotion of police officer—civil service commission.

The sheriff has authority to promote a sergeant of police, who has proved his fitness therefor, to the office of captain of police, when it can be done with advantage to the department, without examination or approval by the civil service commission.

OPINION OF THE JUSTICES BY QUARLES, J.

The controversy herein was submitted without action upon agreed facts under the provisions of section 1748 R. L. In the agreed facts it appears: The plaintiff has been in the employ of the department of police of the city and county of Honolulu during and since April 4th, 1913, acting as sergeant of police until June 1st, 1914, when the sheriff of the city and county of Honolulu promoted him to the position of captain of police to fill a then existing vacancy. The sheriff deemed that such vacancy could be filled with advantage to the department by such promotion and deemed that plaintiff had proved his fitness therefor. June 3rd the sheriff notified the Honolulu civil service commission of such promotion of the plaintiff. June 12th the commission notified the sheriff that it declined to approve such promotion. June 10th the commission fixed a date for conducting a competitive examination for the position of captain of police, gave due notice thereof, which notice was brought to the knowledge of the plaintiff. The plaintiff and other sergeants of police in the service of the city and county failed and refused to take such examination. The commission had adopted rules and regulations which have been in force from February 11th, 1914, a copy of which is made a part of the agreed facts. The board of supervisors have approved the pay-rolls of the police department for the month of June, including the salary of the plaintiff as such police captain at the rate of one hundred and ten dollars per month. The defendant, who is the duly qualified and acting auditor of the city and county of Hono-

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lulu, declines to issue a warrant or warrants for the salary of the plaintiff as captain of police for the month of June, 1914, on the ground that the promotion of the plaintiff was made without authority of law, and that the plaintiff is not in the employ of the city and county of Honolulu. The questions raised and submitted by the agreed facts are whether plaintiff was lawfully promoted to the position of captain of police; and, whether he is entitled to a warrant or warrants for his salary as such for the month of June.

The Honolulu civil service commission is a statutory board appointed under Act 51, Session Laws 1913, entitled "An Act Relating to the Civil Service of the Police and Fire Departments of the City and County of Honolulu," approved April 4th, 1913, and derives all of its powers and authority from the provisions of that act. Section 1 of the act provides for the appointment of the commissioners. Section 2 provides that "no person shall hold or be appointed to any position in either the police department or in the fire department of the City and County of Honolulu without the approval of the Commission in accordance with its rules and regulations." Section 3 provides for the adoption of rules and regulations "to govern the selection and appointment of persons to be employed in either the police or fire department as in its judgment shall be adapted to secure the best service in each department," for the purpose of determining "the physical and educational qualifications, habits and the reputation and standing and experience of all applicants, and shall provide for a competitive examination of all applicants in such subjects as shall be proper for the purpose of best determining their qualifications for the positions sought. Such rules and regulations may provide for the classification of positions and for a special course of inquiry and examination for candidates for each class * * *." Section 4 provides for printing and distributing the rules and that "such rules and regulations shall specify the date when they shall take effect, and thereafter all selections of persons for employment or appoint-

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ment either in the police or fire department shall be in accordance therewith." Section 5 provides that the examinations "shall be public and free for all citizens of the Territory over twenty and under sixty years of age with proper limitations as to residence, health, habits and character," and for tests of manual and physical strength. Section 6 provides that appointees under the provisions of the act shall hold during good behavior subject to removal only as provided by the rules and regulations. Section 7 provides that "when vacancies in existing positions occur, or when new positions are created, * * * which can with advantage to the department in which they occur be filled by the promotion of persons in the service who have proved their fitness therefor they shall be filled by the promotion of such persons. In all other case vacancies shall be filled and all promotions made from the list of persons who have previously passed the examination required by the rules and regulations with the approval of the Commission." Section 8 provides that the act shall not apply to any sheriff or deputy sheriff, while section 9 provides as follows: "This Act shall not be construed to require the examination of any person at present employed in either the police or fire department of the City and County of Honolulu."

The commission, acting within what it believed to be its power and authority, adopted rules and regulations, which, among other things, provide that promotions shall, so far as practicable, "be filled by promotion among persons in the same department who hold positions in the next lower rank or grade," and that "promotions shall be based on competitive examinations and comparative efficiency in the service of the candidate for promotion." On behalf of the defendant it is claimed that the rules and regulations of the commission have the force of law. This contention is manifestly correct as to all rules and regulations authorized by the statute, but no further. We are cited to some New York and Massachusetts cases in support of defendant's contention. In Dillon on Municipal Corporations (5th ed.) section 399, it is said, *inter alia*, as follows: "The

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civil service commission has only such power as the statute specifically confers upon it, or as such as can be necessarily and reasonably inferred for the purpose of enabling it to faithfully and fairly carry out the work committed to it," citing New York cases in support of the doctrine. Then again, in the same section, the same authority further says: "But the rules must conform to the provisions of the statutes relating to the appointment and removal of officers. If there is any conflict, the statutory requirements will control."

There is more or less ambiguity in the statute under consideration. This is especially true as to the words "promotion" and "promotions" found in the last sentences of sections 4 and 7. The whole statute must be read and all of its provisions considered together and the intent of the legislature gathered therefrom, giving to the words used their ordinary significations where a contrary intent is not manifest; keeping in mind the purpose or object of the statute, and the ills, if any, to be remedied thereby. When so read and considered we think it was intended to place the selection and appointment of persons to be thereafter employed in the two departments upon a non-partizan basis as far as practicable, making their selection depend upon qualification and fitness, rather than upon favoritism. The commission was created for the purpose of ascertaining the qualifications of applicants desiring to enter the service in either of the two departments by practical tests to be applied under the rules and regulations of the commission along the lines set forth in the statute. The only authority granted the commission to make rules and regulations is found in section 3 of the statute which restricts the scope of such rules and regulations to the purpose of determining the qualifications of applicants for appointment or employment in the police and fire departments. No power of selection or appointment is granted to the commission by the statute, and no intent is found therein to amend or repeal section 1564 R. L. which vests the power of appointment in the sheriff, either by impli-

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cation or by express provision. Section 3 limiting the scope of the rules and regulations to the matter of determining the qualifications of persons "to be employed," and section 9 exempting all persons in the employ of both departments at the time of the approval of the statute from examination, make it clear that the power and authority of the commission, and the scope of the rules and regulations to be adopted by it, were intended to apply only to persons who should thereafter enter into employment in these two departments, and not to persons already employed, or to the promotion of any person in such employment. Construing sections 2, 3, 4, 7 and 9 together, we think that this intent is clearly apparent. We think that the word "promotion" was inadvisedly used in section 4 of the statute, and that the word in the last sentence of section 7 is without meaning. It is difficult to understand why section 3 of the statute should limit the rules and regulations to be adopted by the commission so as "to govern the selection and appointment of persons to be employed," using the future tense, if such rules and regulations were to govern the promotion of persons in the service. Again, if the legislature intended that promotions in the service should be controlled by the commission through competitive examination why did it, in section 7, provide for the filling of vacancies or newly created positions by the promotion of persons in the service "who have proved their fitness therefor"? It was obviously intended that one in the service, who, by proper conduct and faithful and efficient performance of service, had proved his fitness for promotion, should be promoted on his record for faithful and efficient service without again demonstrating his fitness for the higher position by an examination. Having demonstrated his fitness for promotion, and no provision being found in the statute authorizing the commission to make rules and regulations "to govern" the promotion in such a case, we must conclude that no examination, competitive or otherwise, was intended by the legislature in case of the promotion of a person in the service. We are therefore of the opinion

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that the rule of the commission requiring a competitive examination for promotion is unauthorized by the statute, and therefore void. We are of the opinion that the word "approval" as used in section 2 relates only to applicants desiring to enter the service, and that such approval is evidenced by the commission passing an applicant on examination and placing his name upon the list of eligibles for appointment. We are of the opinion that the commission has power, under the statute, to classify positions in the service, and to hold examinations for each and all classes. In such case the applicant who successfully passes the examination for the higher class and is placed on the eligible list for appointment thereto, is subject to the requirement of the statute that persons in the service who have proved their fitness for promotion, and it will be of advantage to the department to promote such person, must be promoted in preference to eligibles upon the list for appointment to the position. The statute was intended to protect faithful and efficient employees in the service, and such as should come into it. Also to encourage competent persons to place themselves in position to be appointed to positions in the service by taking the required examination and being placed on the list of eligibles, thus tending to prevent the appointment, by favoritism or otherwise, of persons to positions in the service who might not be qualified therefor. One of the objects of the statute is to encourage employees to faithful and efficient service and thereby prove their fitness for a higher position to which they shall be promoted in case of vacancy or newly created position. The good policy of such a rule is apparent, tending as it does to keep experienced men in the higher positions in the service. We are of opinion that in promoting the plaintiff the sheriff acted with authority, and that such promotion was lawfully made. It therefore follows that the plaintiff is entitled to a warrant or warrants for his salary for the month of June, 1914, at the rate of one hundred and ten dollars per month, and that it is the duty of the defendant, as auditor of the city and county of Honolulu to

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issue and deliver the same to the plaintiff. Let judgment enter accordingly.

Thompson, Wilder, Milverton & Lymer for plaintiff.

P. L. Weaver, First Deputy City and County Attorney, for defendant.

J. S. KALAKIELA v. JAMES BICKNELL, AUDITOR
OF THE CITY AND COUNTY OF HONOLULU.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

SUBMITTED AUGUST 11, 1914.

DECIDED AUGUST 14, 1914.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF WATSON, J.

MUNICIPAL CORPORATIONS—*civil service commission—appointments—compensation.*

Under section 2 of Act 51 of the Laws of 1913, the appointment of a clerk to the deputy sheriff by the sheriff of the city and county of Honolulu without the approval of the civil service commission is void, and a person so attempted to be appointed is not entitled to the salary of the office though he has performed the duties thereof.

SAME—*classification of positions—examinations.*

It is the duty of the civil service commission, under said Act, to classify the positions in the departments to which its functions relate and to adapt the examinations to which applicants are subjected to suit the different classes of positions to which appointments are sought. The appointing officer is not required to make an appointment from the list of eligibles furnished by the commission where it does not appear that such eligibles were examined with reference to their qualifications for the position sought to be filled.

OPINION OF THE JUSTICES BY ROBERTSON, C. J.

This is a submission upon agreed facts filed by the parties for the purpose of determining the validity of the plaintiff's claim for pay as clerk to the deputy sheriff of the city and

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county of Honolulu under the circumstances set forth. It appears that on June 1, 1914, a vacancy existing in the position of clerk to the deputy sheriff, the sheriff appointed or attempted to appoint the plaintiff as such clerk "subject however to passing civil service examination," and, on June 3rd, notified the civil service commission to that effect. The plaintiff thereupon made application to the commission that he be permitted to take part in a competitive examination then being held, but the commission refused to allow him to take the examination on the ground that it was an examination for promotion only and not for the purpose of making a list of persons eligible to appointment. Since May 2, 1914, there has been a list containing the names of twenty-two persons who, having passed the examination required by the commission, were, as claimed by the commission, eligible for appointment to any position in the police department, and on June 8, the commission furnished the sheriff with a list of the names of the ten such persons who had made the highest percentages on said examination. No one whose name appeared on the eligible list made application for the vacant position, and in the opinion of the sheriff no one of them was qualified to fill that position. The sheriff notified the commission to that effect. It also appears that the civil service commission has not classified the positions in the police department, there being but one general form and kind of examination as to qualifications of applicants for appointment. Applicants are required merely to state whether they desire to be examined for appointment in the police or fire department. On the other hand, the commission was not notified that a vacancy existed in the position of clerk to the deputy sheriff, or requested to hold an examination for applicants for that place until after the sheriff had appointed the plaintiff as above stated. The commission declared the purported appointment of the plaintiff to be null and void, and directed the sheriff to fill the vacancy by appointment of some person from the list of eligibles or of some person already holding a position in the police

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department. The pay rolls for the police department for the first and second halves of the month of June, including the salary of the clerk of the deputy sheriff, were duly approved by the board of supervisors, but the defendant refused to issue warrants in payment thereof to the plaintiff.

Counsel for the plaintiff contend that in view of the facts that the civil service commission has not classified the positions in the police department, that there is no list of eligibles for clerkships in the department, that no one on the list of eligibles previously made up by the commission made application for appointment to the vacant clerkship, and that however well qualified may be the persons who had previously passed the examination to serve as policemen, none of them, in the opinion of the sheriff, were competent to fill the position in question, the sheriff was authorized to make the appointment, as he did, subject only to the appointee's passing an examination as to his qualifications; that the plaintiff, who has performed the services, is entitled to the salary of the office, and that the refusal of the commission to permit the plaintiff to take an examination should not deprive him of his right to the salary. On behalf of the defendant it is contended that none of the facts referred to are relevant to the issue; that as section 2 of Act 51 of the Laws of 1913 provides that no appointment in the police department shall be made without the approval of the commission, and as one of the rules (rule V) of the commission requires that upon the occurrence of a vacancy the appointing officer shall notify the commission thereof whereupon the commission shall certify to such officer not more than ten names from the eligible list, being those of the highest graded candidates, one of whom shall be appointed to fill the vacancy, the purported appointment was without authority and nugatory, and that the plaintiff, therefore, is not entitled to receive the salary demanded.

In *Kamahu v. Bicknell*, ante, p. 209, it was held that the authority of the civil service commission did not extend to the making of a rule requiring competitive examinations for the

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promotion of persons in the service of the police department, and Mr. Justice Quarles, speaking for the court, said (p. 215) "We are of the opinion that the word 'approval' as used in section 2 relates only to applicants desiring to enter the service, and that such approval is evidenced by the commission passing an applicant on examination and placing his name upon the list of eligibles for appointment." Also, "we are of the opinion that the commission has power, under the statute, to classify positions in the service, and to hold examinations for each and all classes." We are prepared to go further and to hold that it is the duty of the commission to classify the different positions in the departments to which its functions relate and to frame its examinations to suit the different classes, although the language of section 3 of the statute is that the rules and regulations "may" provide for the classification of positions and for a special course of inquiry and examination for candidates for each class. The provision was intended to be mandatory. It is to be noted that the same section requires that the rules "shall provide for a competitive examination of all applicants in such subjects as shall be proper for the purpose of best determining their qualifications for the positions sought." It is obvious that an efficient policeman might be absolutely incompetent to fill a clerkship, and *vice versa*. From the fact that an applicant has shown his qualifications for a patrolman it does not follow that he would make a competent captain of police, clerk or stenographer. This is recognized in the rules of the commission. Thus, in section 2 of rule III, it is provided that "Examinations shall be of such a character and relate to such matters as will fairly test the capacity and fitness of the persons to discharge the duties of the position to which they seek to be appointed;" in section 1 of rule XI, it is provided that applicants who pass the physical and mental examination shall then be examined "in writing, spelling, arithmetic, the English language, and such other practical questions relating to the position sought by the applicant, as shall be deemed advisable by

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the commission;" and section 1 of rule IV provides that "The commission shall, as soon as possible after every examination, prepare and keep open to public inspection the list of persons with their percentages, who have passed the examination and who are eligible for appointment to the position or class of positions for which the examination was held." Provisions such as these are necessary to properly effectuate the object of the statute to secure the appointment of competent persons irrespective of their political partisanship. While it is doubtless true that the sheriff would not be heard to say that in his opinion a certain applicant certified by the commission as being competent to fill a given position was incompetent, yet in this case we think he was justified in refusing to select for the vacant clerkship a person from the list of eligibles submitted by the commission for the reason that the positions had not been classified and it did not appear that any of those whose names were on the commission's eligible list were applicants for a clerkship or had been examined with reference to their competency for such position. We hold, however, that the purported appointment of the plaintiff, having been made without the approval of the commission, was in contravention of section 2 of the statute, and void. It was the duty of the sheriff to notify the commission that the vacancy existed and request that an examination for applicants for the position be held. The sheriff was without authority to make the appointment subject to the subsequent passing by the appointee of such examination as he would be required to take. Presumably the commission could be compelled, in a proper proceeding for that purpose, to hold an examination for applicants for the vacant clerkship, but the attempted appointment of the plaintiff being void he is not entitled to recover compensation as here claimed. Judgment may be entered for the defendant.

Thompson, Wilder, Milverton & Lymer for plaintiff.

P. L. Weaver, First Deputy City and County Attorney, for defendant.

WALTER E. WALL *v.* HERMAN FOCKE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED AUGUST 31, 1914.

DECIDED SEPTEMBER 5, 1914.

ROBERTSON, C.J., AND CIRCUIT JUDGES ASHFORD AND ROBIN-
SON IN PLACE OF WATSON AND QUARLES, JJ.

COURTS—*stare decisis*—*law of the case*.

The doctrine of the law of the case does not apply to facts found by a trial court so as to preclude it, upon a second trial of a case, from finding the facts differently though the evidence be substantially the same.

NEW TRIAL—*hearing de novo*—*findings of fact*.

Where, in a case tried jury waived, the judgment has been set aside and a new trial ordered, the issues not being expressly restricted, the case is restored to the condition it was in before a trial was had, and the whole case is open for hearing and determination as though it had never been tried.

EVIDENCE—*admissions*—*opinions*.

A mere opinion or conclusion, as distinguished from a statement of fact, may not be proved under the rules relating to admissions and declarations. The opinion of an agent based upon a past occurrence is not provable as the admission of his principal, nor as a contemporaneous construction affecting the liability of his principal under a contract with another, nor as the basis of an estoppel against his principal.

CONTRACTS—*express*—*implied*—*evidence*.

The only distinction between an express contract and an implied contract lies in the mode of proof; there is none in the nature of the understanding. The one is to be proven by direct evidence of its terms, while the other is to be shown by indirect evidence, being an implication reasonably drawn from all the circumstances and relations of the parties.

OPINION OF THE COURT BY ROBERTSON, C. J.

The nature of this controversy, some of the main facts of the case, and the proceedings previously had in this court are shown in 21 Haw. 399, 406, 551. The trial court first gave judgment for the defendant upon his counterclaim. The plaintiff then

filed a motion for a new trial, and the same was granted upon a ground which this court found to be untenable. Upon exceptions brought by the defendant the order granting a new trial was set aside. Thereafter, the plaintiff, desiring to present a ground of his motion for a new trial which had not been passed upon, moved the trial court to set a day for further hearing upon the motion. This was denied. Upon exceptions brought by the plaintiff this court remanded the case to the circuit court with directions to determine the motion for a new trial as to the ground which had not been passed upon, namely, that the finding that there was not an implied contract between the parties was contrary to the weight of the evidence. Thereafter, upon consideration of this point, the trial court said that it believed "that at the time the plaintiff undertook the sale of the property and up to the time of the consummation of such sale both parties understood that his (plaintiff's) services were not to be gratuitous, although the amount of such compensation was not agreed upon between the parties." Plaintiff's motion was again sustained and a new trial ordered. The case was retried and judgment given a second time in favor of the defendant for the amount of his counterclaim. The plaintiff brings the present exceptions.

On behalf of the plaintiff it is contended that the decision of the trial court was erroneous in that it reversed the finding made at the time of the granting of the motion for new trial to the effect that the plaintiff had made out a case under the second count of his complaint which was in *indebitatus assumpsit*. The argument is that the evidence was substantially the same upon the second trial as upon the first, and that the doctrine of "the law of the case" required that the finding of fact upon that evidence should have been the same upon the conclusion of the second trial as that expressed by the court in its decision ordering the new trial. Whether the doctrine referred to is in force in this jurisdiction has not been decided. See *Bierce v. Waterhouse*, 19 Haw. 594, 601. In any event, it

would not apply to facts found by a trial court so as to preclude it, upon a second trial of a case, from finding the facts differently though the evidence be substantially the same. "The 'law of the case' is a phrase which has been formulated in this state to give expression to the rule that the final judgment of the highest court upon a question of law arising between the parties to an action on a given state of facts, establishes the rights of the parties to that controversy, and is a final determination thereof, and like a final judgment in any other case, estops the parties thereto from afterwards questioning its correctness." *Klauber v. Car Co.*, 98 Cal. 105, 107. "So well settled is the proposition that the doctrine of the law of the case, generally speaking, is applied only to the principles of law laid down by the court as applicable to a retrial of fact, that it does not embrace the facts themselves, and does not even embrace points of law not presented and determined, that no quotation from the authorities is necessary." *Moore v. Trott*, 162 Cal. 268, 273. The rule which is applicable to the case in hand is the well settled one that where a judgment has been set aside and a new trial granted, the issues not being expressly limited by the order, the case is restored to the condition it was in before the trial was had, and the whole case is open for hearing and determination as though it had never been tried. *Freeman on Judgments* (3d ed.), Sec. 481; 29 Cyc. 1028, 1033; *Zaleski v. Clark*, 45 Conn. 397; *Minneapolis Mill Co. v. Minneapolis etc. R. Co.*, 58 Minn. 512; *Cahn v. Tootle*, 58 Kan. 260; *Deiermann v. Bemis*, 144 Mo. App. 474. The cases draw no distinction, and we see none in principle, between cases tried before a jury and those tried jury waived. This seems to be conceded, but counsel seek to make an exception of cases tried without a jury where the same judge presides at the second trial. When an order has been made granting a new trial unrestricted, all findings of fact preliminary to the judgment must be regarded as having fallen with the judgment. The result follows from the entry of the order and cannot be made to de-

pend upon the subsequent circumstance whether upon the new trial the court is to be held by the judge who presided at the first trial or by another judge. The record in this case shows that a motion made by the defendant at the outset of the second trial that the trial be confined to the second count was denied. No attempt to have the issues restricted appears to have been made by the plaintiff and the case was tried as fully and completely as though no previous trial had been had.

Certain of the exceptions relate to rulings made excluding certain evidence offered by the plaintiff. It appeared by uncontradicted evidence that during the absence from the Territory of the defendant for several months in 1906, one Muhlendorf was the defendant's attorney-in-fact under a power of attorney authorizing him to sell real estate belonging to the defendant in this Territory, and that shortly before his departure the defendant handed to his agent a memorandum of instructions, which, so far as pertinent to this case, stated: "Pilipili Lot 54 acres, I own this jointly with Wall, the surveyor, he has the handling of it for a commission. If he perfects any sale during my absence, you may approve of it, for I like to get a start in selling a portion at least." The defendant testified that the statement "he has the handling of it for a commission" had reference to an agreement between the plaintiff and himself whereby the former, in consideration of the payment of a commission of ten per cent. upon revenue received from the land, made sales of firewood and collected rents and pasturage fees, and supervised the clearing of the land, the cost of which was paid out of the revenue. The contention that the memorandum amounted to an admission on the defendant's part that he had agreed to pay the plaintiff a commission in the event that he should effect a sale of the land was not sustained by the trial court. It was in this connection that the plaintiff sought to introduce in evidence certain statements claimed to have been made by the defendant's agent, Muhlendorf, prior to and at the time of the execution of the agreement of sale of the land, to the effect that the

plaintiff would be entitled to receive from the defendant a commission upon defendant's share of the purchase price. On behalf of the plaintiff it is contended that the statements were admissible as admissions made by the defendant's agent within the scope of his authority, or as a contemporaneous construction placed upon an ambiguous written authority by the agent and the plaintiff, or by way of an estoppel binding upon the defendant. The ruling of the trial court in excluding the evidence may be sustainable upon more than one ground, but we deem it sufficient to say that it appears to us that the statements, if made, were no more than expressions of opinion by the agent as to which his principal would not be affected. What the basis of the agent's opinion was did not appear further than it may be presumed to have been based on his reading of the memorandum of instructions. But the agent's opinion that the agreement previously entered into by the plaintiff and defendant whereby the former was to receive a commission for "handling" Pilipili entitled him to a commission on the purchase price in the event of a sale of the land was not admissible as an admission of the defendant or that of an authorized agent. "The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals; and this is doubly true where the agent was not a party to those occurrences." *Ins. Co. v. Mahone*, 21 Wall. 152, 157. "A mere opinion or conclusion, as contradistinguished from a statement of fact, may not be proved under the rules relating to admissions and declarations." 1 R. C. L. 481. See *Plymouth County Bank v. Gilman*, 3 S. D. 170, 176; *Torson v. Beckley*, 20 Haw. 406, 409. Such declarations of an agent, being mere expressions of opinion, would not amount to a "contemporaneous construction" which would bind the principal, nor could they form the basis of an estoppel.

The plaintiff sought also to show that on another occasion, after the defendant's return to Honolulu, that Muhlendorf, in response to a question put to him by the plaintiff, admitted in

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the presence of the defendant that he had previously said that the plaintiff was entitled to a commission upon the purchase price of the land, and that the defendant not only made no denial of it, but warned Muhlendorf that there was a witness present. The testimony was excluded and we think properly so. The argument here is that the failure of the defendant to make a denial amounted to an admission by silence. But, as pointed out by the trial court, "What reply could Mr. Focke have given? * * * The parties had just been in a conversation where Mr. Focke had denied that Mr. Wall was entitled to a commission, and they came directly to Mr. Muhlendorf, who admitted to Mr. Wall that he had admitted that Wall was entitled to a commission on the first five hundred dollars. Mr. Focke could not deny what had been said, as he was not present when the first admission was made, and nothing Mr. Focke could say would add to the knowledge of the parties." If the defendant's conduct amounted to an admission at all it imported no more than that his agent had given vent to an opinion. That opinion appears, however, at no time to have been shared by the defendant himself.

Under an exception to the decision of the circuit court counsel for the plaintiff contend that, as to the *quantum meruit* claim under the second count of the complaint, the decision is based upon an erroneous and unsound conception of the law, and that the trial court failed to apply the principles set forth in the first opinion of this court in 21 Haw. 399. We do not take counsel's view of the matter. In a carefully prepared decision the trial court, after stating the salient facts of the case, said, "It will be seen from the foregoing that this is primarily a question of fact as to the existence of a specific contract or understanding that any certain commission, to-wit, ten per cent., should be paid for the sale of the land, or whether or not there was any understanding that any commission at all should be paid. The proceedings were, up to the time of the sale, entirely oral and had to do almost entirely with but the two persons

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interested. * * * When the existence of an oral contract is alleged by one party thereto and denied by the other, the court or jury must of necessity look primarily to the surrounding facts and circumstances. The gist of an action of assumpsit, whether in special or general assumpsit, whether the plaintiff be suing on an express contract or an implied, is the meeting of the minds of the parties. * * * As the burden of proving this meeting of the minds, 'their mutual and accordant wills,' is on the plaintiff, it follows that the surrounding facts and circumstances, in order to prove a contract, must be something more than suggestive or indicative of the existence of such contract. They must afford a fair preponderance of evidence in favor of the existence of such contract. * * * The parties to this action were tenants in common and their interests were thereby interlocked and interwoven. What was for the benefit of one was necessarily for the benefit of the other. Each was equally interested financially in seeing the land sold at a good figure and each was anxious to have the sale become a fact. The surrounding circumstances must be considered with these facts in view. Unfortunately the circumstances which throw any light whatsoever upon the contractual relations of the parties are very meager. Do 'such circumstances demand the conclusion of a contract to account for them?' (quoting from *Hertzog v. Hertzog*, 29 Pa. St. 465, 468). The court, after making a critical examination of the testimony relating to the circumstances upon which counsel for the plaintiff laid stress, said "None of the above circumstances, therefore, seem to me 'to demand the conclusion of a contract to account for them.'" The court then discussed the evidence relating to the memorandum of instructions given by the defendant to his agent, and the testimony given by the parties themselves with reference to the alleged express contract, and concluded by saying, "All that has been said in the foregoing applies to both counts in this action, for, as held by the supreme court," in its first opinion in this case, "the mutual agreement of the parties, especially

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where situated as these parties, cotenants of land, is as necessary under the count *quantum meruit* as under a count in special contract. It must clearly appear 'to the satisfaction of the court that compensation for services to be rendered was to be made and the services were rendered with reference to such understanding.' This is another way of saying that the circumstances must 'demand the conclusion of a contract to account for them.' I am, therefore, of the opinion that judgment must be for the defendant." In their brief counsel say "This last language is plainly fallacious and illustrates how the trial court construes the law of *quantum meruit*, i. e., that an actual contract must be found to exist between the parties when *quantum meruit* liability is claimed, exactly as such contract or agreement must be found when recovery is claimed upon an express contract. But *quantum meruit* recovery necessarily connotes absence of an actual contractual understanding." We think the view taken of the law by the trial court was in entire harmony with the principles previously enunciated by this court, and constituted a correct exposition of the law applicable to such a case as this. The only distinction between an express contract and an implied contract as defined in our former opinion (21 Haw. 404) is in the mode of proof; there is none in the nature of the understanding. Both are founded upon the actual agreement of the parties. The one is to be proven by direct evidence of its terms, while the other is to be shown by indirect evidence, being an implication reasonably drawn from all the circumstances and relations of the parties. 15 A. & E. Enc. Law (2d ed.) 1078; *Smith v. Moynihan*, 44 Cal. 53, 62; *City Council v. Water Works Co.*, 77 Ala. 248, 254; *Columbus etc. R. Co. v. Gaffney*, 65 Oh. St. 104, 114; *Rose v. Wollenberg*, 36 Ore. 154, 158.

The evidence referable to the first count with regard to the alleged express contract to pay a commission of ten per cent. upon a sale of the land was diametrically in conflict and a determination of the issue by the trial court either way would

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have been supported by substantial evidence, but it is not so easy to see how the trial court could have reached a different conclusion upon the question of an implied contract. The decision and judgment were amply sustained by the evidence.

Exceptions overruled.

W. B. Lymer (Thompson, Wilder, Milverton & Lymer on the brief) for plaintiff.

C. H. Olson (Holmes, Stanley & Olson on the brief) for defendant.

THE VOLCANO STABLES & TRANSPORTATION
COMPANY, LIMITED, PLAINTIFF, *v.* J. S. FERRY,
DEFENDANT; J. G. SERRAO, GARNISHEE.

RESERVED QUESTIONS FROM CIRCUIT COURT, FOURTH
CIRCUIT.

SUBMITTED SEPTEMBER 21, 1914.

DECIDED SEPTEMBER 28, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

COURTS—*circuit judge at chambers—jurisdiction—garnishment.*

The expression "circuit judge (or court) at chambers" has two meanings in the statutes of this Territory. It may refer either to the independent jurisdiction exercised at chambers pursuant to R. L. Sec. 1648, or to the incidental jurisdiction exercised at chambers in connection with or ancillary to an action at law. A proceeding for the attachment of a debt due a judgment debtor pursuant to R. L. Secs. 2117, 2118, may be had in exercise of the jurisdiction of the latter kind.

GARNISHMENT—*attachment of debt after judgment—form of order citing judgment debtor.*

Under R. L. Sec. 2117, the direction to the judgment debtor should be to appear for examination as to any and what debts are owing to him, but it is not such a defect as to require the quashal of the order that the direction was to appear and show cause why a particular debt due to him should not be attached and paid to the judgment creditor. Both debtor and garnishee may be summoned at the same time and pursuant to the one order.

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OPINION OF THE COURT BY ROBERTSON, C. J.

The plaintiff filed in the court below a sworn petition setting forth that in an action of assumpsit commenced in the circuit court of the fourth judicial circuit by the plaintiff against the defendant, the plaintiff recovered judgment on the 16th day of June 1913, in the sum of \$797.70; that the sum of \$202.50 has been paid to the plaintiff on account of said judgment; that the sum of \$595.20 is due and owing, and that to said amount said judgment remains unsatisfied; and that J. G. Serrao, named herein as garnishee, is indebted to the defendant and is within the jurisdiction of the court. The prayer of the petition was "that upon a day certain to be set by your honor the said J. G. Serrao and the said J. S. Ferry shall be summoned to appear before your honor and that each of them may show cause why the amount due from the said garnishee to the said defendant should not be paid by the said garnishee to the said plaintiff or so much thereof as may be sufficient to satisfy the said judgment debt of \$595.20 and that plaintiff may have judgment against the said garnishee for such sum as may be then and there found due from the garnishee to the said defendant and for costs and such other and further relief as to the court may seem meet." Upon this petition the circuit judge made and entered an order directing "that the said J. S. Ferry and J. G. Serrao be each served with a copy of this order and of the petition herein filed and that they be summoned to appear before me at my chambers in Hilo on Tuesday the 3rd day of March, A. D. 1914, at 10 o'clock, A. M. there to show cause, if any they have, why the debt due from the said J. G. Serrao to the said J. S. Ferry should not be attached in the hands of the said J. G. Serrao and that a judgment be entered against the said defendant and the said garnishee requiring the said garnishee to pay such debt as he shall then owe to the said plaintiff." The petition, order and summons were entitled "in the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. In Chambers." After

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service of the order the defendant appeared specially and filed a motion to quash the order upon several grounds which involved two questions which the circuit judge reserved for the consideration of this court, viz: (1) Under the circumstances set forth in this certificate and in the records transmitted herewith, did the circuit judge, sitting at chambers, have jurisdiction in supplemental garnishment proceedings as above set forth?, and (2) Did the circuit judge of the fourth circuit, sitting at chambers, have jurisdiction to order the defendant, J. S. Ferry, to appear and show cause why the debt due from the said J. G. Serrao to the said J. S. Ferry should not be attached in the hands of the said J. G. Serrao and a judgment be rendered against the said defendant?

Provisions for the garnishment of debts due a judgment debtor are contained in sections 2117-2121 of the Revised Laws. Section 2117 authorizes application to "the court or a judge thereof" for a rule, order or summons against a judgment debtor that he be orally examined as to any and what debts are owing to him. Section 2118 authorizes, upon the *ex parte* application of a judgment creditor either before or after such oral examination of the debtor, (upon a certain showing by affidavit) to order that all debts owing from any other person (called the garnishee) to the judgment debtor shall be attached to answer the judgment debt, and by the same or a subsequent order the garnishee may be directed to appear and show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor. Section 2119 provides that service of the order attaching debts shall bind the debt in the garnishee's hands. The remaining sections provide for a hearing in case the garnishee disputes liability, for the issuance of execution, etc.

The contention of counsel for the defendant that the proceedings authorized by the statute are to be had on the law side of the circuit court, and not before a circuit judge in exercise of the jurisdiction conferred by section 1648 of the Revised

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Laws is correct. This was pointed out in *Hawaiian News Co. v. McBride*, 19 Haw. 625. But counsel is wrong in assuming that because the petition and order were entitled "In Chambers" the proceeding was brought within the independent jurisdiction of the circuit judge above referred to. The expression "circuit judge at chambers" has two meanings in our statutes; it may have reference either to the independent jurisdiction exercised pursuant to section 1648, or to the incidental jurisdiction exercised at chambers in connection with or ancillary to an action at law pending in the circuit court. *Western Nat. Bank v. Peacock*, 18 Haw. 161. The making of the order in this case was a proper exercise of the jurisdiction of the kind last mentioned, and the papers were appropriately entitled in the circuit court, in chambers.

The form of the order was not in strict accord with the terms of the statute. Properly, the direction to the defendant should have been to appear for examination as to any and what debts were owing to him. The direction was that he appear and show cause why the debt due him from Serrao should not be attached and paid to the plaintiff. But the debt became attached upon service of the order on the garnishee. The direction was specific instead of general, but under it, the defendant, upon appearing, could be orally examined as to the alleged indebtedness agreeably to the intent of the statute. We think there was a substantial compliance with the statute, and that the defect, if it could be called such, was merely technical, and did not require the quashal of the order.

Under section 2118 the application for an order attaching debts may be made either before or after the examination of the judgment debtor, and we know of no reason why both debtor and garnishee should not be summoned, as they were in this case, at the same time and pursuant to the one order.

We reply in the affirmative to each of the questions propounded.

C. S. Carlsmith for plaintiff.

Harry Irwin for defendant.

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JOSEPH PAIKO AND JOSEPH PAIKO, JR., v. LIBERT
H. BOEYNAEMS, BISHOP OF ZEUGMA, BISHOP
OF THE ROMAN CATHOLIC CHURCH IN THE
TERRITORY OF HAWAII.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

SUBMITTED JUNE 23, 1914.

DECIDED OCTOBER 6, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

QUIETING TITLE—statutory action—adverse claim.

One in possession of land claiming title thereto in fee simple under a will, may maintain an action to quiet title under R. L. Chap. 132, against one who, under the same will, claims a remainder in fee in the land contingent upon the death of the party in possession without heirs of his body, such claim being an adverse one within the meaning of the statute.

WILLS—construction—repugnancy—general and specific provisions.

The rule that where two clauses in a will are in irreconcilable conflict the later one will prevail does not apply where a contrary intent has been manifested. Where there is an inconsistency between a general and specific provision the latter will prevail regardless of the order in which it stands in the will, the presumption being that the testator intended that the specific provision would operate upon the property mentioned in it and the general provision upon other property.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

The agreed statement of facts in this case sets forth that one Manuel Paiko died testate in Honolulu on the first day of April, 1890, leaving surviving him his widow, Domitila K. Paiko, and his son Joseph Paiko and grandson Joseph Paiko, junior, the plaintiffs herein; that Domitila K. Paiko died on October 23, 1906; that the said Joseph Paiko has never had a lawful child other than the said Joseph Paiko, junior, and the said Joseph Paiko, junior, has never had a lawful child; that Manuel Paiko's will was duly admitted to probate, the estate has been administered and the executor discharged; that the widow took under the will and did not claim dower; that

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the estate of the said Manuel Paiko consisted of the premises at the corner of King and Maunakea streets, in Honolulu, referred to in paragraph two of the will, a house lot at Kolopo, Honolulu, referred to in paragraph three of the will, the land at Kuliouou, Oahu, referred to in paragraph four of the will, and some cash; that a piece of land situate at Lahaina, Maui, referred to in paragraph three of the will, was sold by the testator in his lifetime, and the premises at Kolopo were sold by the widow in 1904.

It is stipulated that judgment may be entered herein as in a statutory action to quiet title, determining the questions in controversy and declaring what title, interest and estate were given by the will to each of the parties hereto in the lands mentioned in paragraphs two and four of the will. The defendant is the bishop of the Roman Catholic church in the Territory of Hawaii.

The material portions of the will of Manuel Paiko, being paragraphs one, two, four, six and seven, are, as shown by the translation attached to the submission, as follows:

"One. For Mrs. Domitila M. Paiko, my much beloved wife all my real and personal property while she is alive, except those matters described in this instrument.

"Two. My piece of land house lot adjoining the makai corner of King and Maunakea streets on the Waikiki side for my son Joe Paiko and he may collect the rent of Fifty Dollars per month, and if he should die first, then, it goes to Joe Paiko Jr. but they cannot sell, dispose or mortgage this piece of land.

"Four. For Joe Paiko Jr. my grandchild all the piece of land situate at Kuliouou in the Ahupuaa of Maunaloa, Oahu and everything thereon, after the death of his grandmother Mrs. Domitila M. Paiko.

"Six. After the death of my much beloved wife Mrs. Domitila M. Paiko, all my real property and all my personal property is to descend to my son Joe Paiko, and my grandson Joe Paiko, Jr. and to the heirs begotten of their bodies in a direct line from them.

"Seven. If they have no heirs begotten of their bodies, as

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set forth in Section Six, then my administrators may (can) sell by public auction all of my real and all my personal property, and after deducting all expenses of such sale, then all of such property to go to the custody of the Bishop of the Roman Catholic Church, for the benefit of all Roman Catholic Churches throughout the Hawaiian Islands, and he may give a part thereof for the poor if he should deem proper."

Paragraph three of the will reads as follows:

"Three. For Mrs. Domitila M. Paiko my much beloved wife all that piece of land houselot, and the buildings thereon, situate at Kolopo adjoining Nuuanu and Hotel streets, adjoining the houselot of J. M. Kapena immediately mauka, she may sell or convey it as she deems fit, or to devise to her heirs, while she is alive, my heirs and my administrators have no right to interfere, that being her dower right in all of my property, also devising (disposing) my piece of land houselot situate at Lahaina Maui being the piece bought by me from Antone Sylva Mason of Lahaina, Maui deceased."

The title to the property at Kolopo is not involved in the present controversy, and this paragraph is important only to the extent that it may throw light on the intent of the testator with reference to the other clauses of the will.

On behalf of the plaintiffs it is claimed that under paragraph two the title to the property therein mentioned vested in Joseph Paiko in fee simple conditional, subject to being defeated in favor of Joseph Paiko, junior, in the event of the father dying before his son, in which event the title would vest absolutely in the latter. And as to the property at Kuliouou it is claimed that under paragraph four title passed to Mrs. Paiko, for life, remainder to Joseph Paiko, junior, in fee simple. The defendant claims "that the estates given by the will to the son and grandson are as follows: (a) to the grandson an estate for life only in the land of Kuliouou, beginning upon the death of his grandmother; (b) to the son, an estate for life only in the King street property; and (c) to the grandson, an estate for life only in the King street property, beginning upon the death of his father, if the grandson shall survive his father,"

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and that it was the testator's intention "after the death of the son and of the grandson, to give the remainders in the King street property and in Kuliouou to the heirs of their bodies in a direct line and if none such survive them then to the bishop of the Roman Catholic church for the benefit of that church." Thus it is seen that the title and right of possession of the plaintiffs during the terms of their respective lives is conceded, the defendant's claim to the remainder in the two parcels of land being contingent and depending upon the death of the testator's son and grandson without leaving "heirs begotten of their bodies in a direct line," the contention being that "heirs of their bodies" were used as words of purchase and not of limitation. After the case had been submitted, the court entertaining a doubt whether a present controversy existed and whether the case presented anything more than a moot question, requested counsel to file briefs on the point whether, under the circumstances, the court should exercise jurisdiction and proceed to construe the will. The question is whether the claim of a contingent interest in certain lands, where the contingency may never occur, may be made the basis of an action to quiet title to such lands under chapter 132 of the Revised Laws, by one in possession claiming ownership in fee simple. In *Paiko v. Boeynaems*, 21 Haw. 196, this court held that as the respective claims of these parties were of strictly legal interests in the land a court of equity was without jurisdiction to construe this will, the point having been raised by demurrer. The present submission is made in lieu of an action to quiet title under the statute. Section 2085 of the Revised Laws provides that "Action may be brought in any of the circuit courts by any person against another person who claims adversely to the plaintiff an estate or interest in real property, for the purpose of determining such adverse claim," and section 2086 provides that "Any person may be made a defendant in such action who has or claims an interest in the property adverse to the plaintiff, or who is a necessary party to a complete determination or settle-

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ment of the question involved therein." These provisions have heretofore been given a construction and effect consonant with their broad terms. See *Kahoiwai v. Limaau*, 10 Haw. 507; *Mossman v. Dole*, 14 Haw. 365, 369; *Allen v. Lucas*, 15 Haw. 52. Referring to a similar statute, the supreme court of California, in *Head v. Fordyce*, 17 Cal. 149, 151, said, "the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretension. The plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property." In *Goldberg v. Taylor*, 2 Utah 486, 491, the court said, "The words 'claims an estate or interest' are used in a broad sense, and are not technical in their meaning, and were evidently intended to embrace every species of adverse claim set up by a party out of possession whereby the plaintiff's enjoyment of his property may be interfered with." It is manifest that the defendant's claim, though contingent in character, must tend to depreciate the value of the titles claimed by the plaintiffs, and that it is of importance to the plaintiffs that the validity of his claim be passed upon and settled. In *Kimmel v. Shaffer*, 219 Pa. St. 375, 379, where the claim of the defendant was of a contingent right upon the death of the life tenant, the court said, "But this though it refers to the future is still a present dispute of the title by which the plaintiff holds possession and is, therefore, within the act. 'What the party in possession needs and what the act gives him is the right to a present adjudication of his title.' *Canal Co. v. Genet*, 169 Pa. 343." And in *Ball v. Woolfolk*, 175 Mo. 278, 285, it was held that a statute authorizing the bringing of an action "against any person, having or claiming to have any title, estate or interest" in the premises in dispute "is broad enough to include a future or

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contingent interest." We are of the opinion that the defendant "has or claims an interest in the property adverse to the plaintiffs," within the meaning of the statute, and that the plaintiffs would be entitled to institute against him an action "for the purpose of determining such adverse claim," and that the defendant is "a necessary party to a complete determination" of the question involved.

In studying this will in the endeavor to ascertain from its terms the intention of the testator we find considerable difficulty. The will is, of course, to be construed as a whole and any apparent inconsistencies are to be reconciled if possible. There is some ambiguity compelling construction. Some questions have been discussed, however, which we are not required to decide. Thus, for example, the plaintiffs are not adversary parties in this proceeding and we are not to decide, as between them, what their respective rights are under paragraph two in the property on King street. It will be necessary only to ascertain what, if any, interest the defendant has in the lands in question. The defendant's claim can be asserted only under paragraph seven of the will which is to be read in conjunction with paragraph six, and we assume that if the event shall happen upon which the interest claimed by the defendant would become vested, the defendant would be entitled to the possession of the lands and not have merely a right to the proceeds of the sale of them.

Paragraph seven applies to the same property that paragraph six applies to, and none other, and we think paragraph six may properly be regarded only as an independent devise, general in character, applicable to property not otherwise disposed of—applicable, probably, to the land at Lahaina mentioned in paragraph three had it not been sold by the testator. It certainly would have been applied to any property acquired by the testator subsequent to the execution of the will had he left any such. The contention of counsel for the defendant that what the testator meant by paragraph six was that "the King

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street property he had given to his son for life was after his death to go to the remaindermen named, that Kuliouou which he had given to his grandson for life, was after the latter's death to go to the remaindermen named, and that the Nuuanu street property was after the death of the widow to go to the son and grandson in common and after their death to the remaindermen named" cannot be sustained upon the language used by the testator. To obtain the effect contended for the paragraph would have to be re-written. Paragraph six, by its very terms, has application only to lands in which the widow was given a life estate, so it could not apply to the property mentioned in paragraph two in which the widow was given no interest whatever. We can find no warrant for a construction of that paragraph which would constitute the son and grandson tenants in common (after the death of the widow) as to the property mentioned in paragraph three and yet recognize separate interests in them as to the lands mentioned in paragraphs two and four. We think that the language of the sixth paragraph requires a holding that as to any and all property to which it was designed to apply the effect necessarily was to create a tenancy in common in the son and grandson. By paragraph one the testator devised to his wife for life all his real and personal property "except those matters described in this instrument." This exception is a literal translation of the words "koe nae na mea i hoakakaia ma keia palapala," and may be understood as equivalent to the phrase "except as herein otherwise provided." As it is clearly "otherwise provided" in paragraph two we must hold that the widow took no interest in the King street property, that paragraph six does not apply to that property, and that the defendant has no interest therein under paragraph seven, or otherwise.

Under paragraph four the widow should be held to have taken an estate for life by necessary implication. This is not disputed. The grandson took a remainder in the property mentioned in that paragraph upon the death of his grandmother.

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The devise to the grandson being an indefinite one the question whether it was intended that he should take in fee simple or for life only is to be ascertained from the will taken as a whole. *King v. Hawaiian Trust Co.* 21 Haw. 619, 622. An indefinite devise followed by a limitation over upon the death of the devisee would ordinarily be held to create a life estate in the first taker. *Paaluhi v. Keliiahaleole*, 11 Haw. 101; *Mouritz v. Lewis*, 12 Haw. 19; *Robinson v. Aheong*, 13 Haw. 196, 200. And where there is no limitation over or other restriction a devise of a "piece of land" will give to the devisee title in fee simple. *Keanu v. Kaohi*, 14 Haw. 142. May paragraph six be regarded as a limitation over upon the death of the grandson without children as to the Kuliouou property? We think not, for reasons stated above. If that paragraph is to be taken as referring to the land mentioned in paragraph four there is a repugnancy for by the earlier clause the grandson would take the remainder upon the death of the widow, whereas by the later provision the son and grandson would, upon her death, take as tenants in common. If it is a case of apparent repugnancy the defendant would not be benefited for the reason that the testator will not be held to have intended the earlier specific provision to have been abrogated by the later general provision. The rule that where two clauses are in irreconcilable conflict the later one will prevail does not apply where a contrary intent has been manifested. *Hapai v. Brown*, 21 Haw. 499, 505. *In re Ehlers' Will*, 155 Wis. 46, 49. It is a reasonable presumption that the testator intended that the specific provision would operate upon the property named in it and the general provision upon other property. Where there is an inconsistency between a general and specific provision the latter will prevail regardless of the order in which it stands in the will. 40 Cyc. 1418; *In re Donner*, 65 N. J. E. 691, 697; *Board v. Stead*, 259 Ill. 194, 208; *Waring v. Bosher*, 91 Va. 286, 291; *Howard v. Evans*, 24 App. Cas. (D. C.) 127, 135; *White v. McCracken*, 87 Mo. App. 262; *Hurst v. Weaver*, 75 Kan. 758, 762. The natural

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construction of paragraph four, whereby the testator devised the land at Kuliouou to his wife for life and upon her death to his grandson, would be that the grandson was intended to take the remainder in fee simple. This intent is not to be nullified by the general terms of the subsequent paragraph.

What effect the fact that, as shown by the agreed facts, Joseph Paiko has an "heir begotten of his body in a direct line," to wit, a son, would have upon the defendant's claims under paragraph seven we need not inquire in view of the conclusion we have reached.

It follows from what has been said that the defendant took no interest in the lands mentioned in paragraphs two and four of this will.

Judgment accordingly.

J. Lightfoot for plaintiffs.

A. D. Larnach and *A. Perry* for defendant.

PERCY M. POND AND W. A. GREENWELL *v.* ALEXANDER C. MONTGOMERY AND EUGENE R. HENDRY, UNITED STATES MARSHAL OF THE DISTRICT OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED SEPTEMBER 28, 1914.

DECIDED OCTOBER 6, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EQUITY—pleading—proper parties to bills.

One who has an interest in the subject matter of a suit in equity, though not interested in the controversy between the immediate litigants, is a proper party to the suit.

SAME—misjoinder of defendants—who may raise objection.

An objection for misjoinder of defendants may be made only by the defendant improperly joined, at least where his joinder will not affect the decree against the proper defendant.

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OPINION OF THE COURT BY ROBERTSON, C.J.

This is a suit in equity to reform a mortgage and to foreclose it, for an injunction and other relief, instituted on April 8, 1914. To the bill of complaint the respondent Montgomery interposed a demurrer upon several grounds, two of which were sustained, viz: that it does not appear that the complainant Greenwell has any interest in the subject matter of the suit, and, therefore, is not a proper party plaintiff; and that Hendry was improperly joined as a party respondent.

The bill avers the execution of a lease by one Annie S. Parke, to the respondent Montgomery, of certain premises on Fort street, Honolulu, on the 17th day of March, 1911, for the term of five years from May 1, 1911; the giving of a mortgage by Montgomery to the complainant Pond of said lease on the 1st day of July, 1912, to secure the payment of the sum of \$2400; the execution by Pond and Montgomery, at the same time and as part of the consideration of said mortgage, of a power of attorney to one W. C. Parke authorizing him to collect the rents from lessees and tenants of the demised premises, and to apply the same to the payment of the rent to Mrs. Parke, to make other payments necessary to the performance of the obligations of the lease, to pay to Pond the amount of the debt, principal and interest, as required by the terms of the mortgage, and to pay the balance, if any, to Montgomery; the execution of a lease on July 1, 1913, by said Montgomery to one Hendry, United States marshal for the district of Hawaii, for and in behalf of the United States, of the said premises, for the term of one year with the privilege of renewal; the substitution by Parke, pursuant to authority given him in and by said power of attorney, of the complainant Greenwell, as attorney for the mortgagor and mortgagee; a scrivener's error in the note and mortgage whereby certain terms agreed upon by the parties failed of expression; the payment of a part of the principal of the mortgage debt, and default in the payment of the balance of the principal and the interest thereon, amounting

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in all to the sum of \$2383.18; breach of the covenant on the part of the mortgagor in failing to pay rent due under said lease; entry by the mortgagee upon the premises, on March 19, 1914, for condition broken; and the giving of notice of such entry, and of the appointment of Greenwell under the power of attorney, to the respondent Hendry on March 27, 1914. The bill prays for the reformation and the foreclosure of the mortgage, for the appointment of a receiver; that an account be had of the amount due; that the respondent Montgomery be restrained from collecting rent under the lease of July 1, 1913; that the respondent Hendry be enjoined from paying rent to Montgomery; and for general relief. The circuit judge dismissed the bill as to the complainant Greenwell and as to the respondent Hendry. The complainants appeal.

Greenwell as a party plaintiff. Counsel for the demurrant contend that Greenwell has no interest in the suit; that Parke, and therefore Greenwell, was a mere agent whose authority under the power of attorney terminated upon the breach of condition by the mortgagee upon which this suit to foreclose the mortgage is predicated. By the terms of the instrument the authority of the attorney to collect and dispose of the rental money was to continue "for and during such time as said mortgage shall continue in force and effect, and or until said sum of twenty-four hundred (\$2400) dollars, with interest, shall have been fully paid to said Pond." It seems clear from this language that Greenwell's authority to demand, collect and dispose of the rents did not terminate upon the alleged breach but is to continue until the mortgage debt shall be paid or the mortgage foreclosed. Again, it may become important for the complainant Pond as well as the respondent Montgomery to know and have determined the exact amount of the rentals collected by Greenwell by virtue of his authority should any question arise in that regard. Furthermore, Greenwell has at least an indirect interest in that part of the bill which applies to the reformation of the mortgage and note. The alleged mistake

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had to do with the time and manner in which, by instalments, the mortgage debt was to be paid, and thus having a bearing upon Greenwell's duty in the premises. It is proper that he should be concluded by the decree in the case.

In view of all this we are of the opinion that Greenwell, though perhaps not a necessary party, is at least a proper party to the suit. "Formal or nominal parties are those who have no interest in the controversy between the immediate litigants, but who have an interest in the subject matter which may be conveniently settled in the suit and thereby prevent future litigation." 15 Enc. Pl. & Pr. 659; *Kelley v. Boettcher*, 85 Fed. 55, 64. "In chancery practice all persons who might be affected by the decree are proper, though they may not be necessary parties to the suit." *Slaton v. Anthony*, 143 S. W. 201, 203.

Hendry as a party defendant. It is contended that the respondent Hendry appears to have been simply the agent of the United States in leasing the premises in question, and was entirely without interest in the suit. The objection to the joinder of Hendry, however, was raised only by Montgomery, and no satisfactory reply has been made to the contention of counsel for the complainants that for a misjoinder of parties defendant only those may demur who have been improperly joined. There is a well settled rule to this effect. "If the misjoinder is of parties as defendants, those only can demur who are improperly joined." Story's Eq. Pl. Sec. 544. "A misjoinder of defendants is a personal defense which can be taken advantage of only by defendant improperly joined, at least where his joinder will not affect the decree against the proper defendant." 16 Cyc. 205. The objections to the joinder of Hendry and Greenwell are purely technical, and it is not contended that any harm can come to Montgomery by reason of their being made parties.

The order appealed from is reversed and the case is remanded to the circuit judge for further proceedings.

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D. L. Withington (*Castle & Withington* on the brief) for complainants.

R. J. O'Brien (*E. C. Peters* with him on the brief) for respondent Montgomery.

NO. 787. J. ALFRED MAGOON, ET AL., v. LORD-YOUNG ENGINEERING COMPANY, LIMITED. Appeal from Circuit Judge, First Circuit. Argued October 5, 1914. Decided October 6, 1914. Robertson, C.J., Watson and Quarles, JJ. Per curiam: The court, of its own motion, requested counsel to appear and present their views with reference to the matter of the qualification of Mr. Justice Watson to sit and partake in the hearing and decision of the appeal in this case.

The original complaint was filed in the court below on March 4, 1914. On March 5, a demurrer was interposed by the defendant, Lord-Young Engineering Company, Limited, which was signed "Thompson, Wilder, Watson & Lymer. F. W. M. and Fred W. Milverton" as attorneys for the said defendant. Later, other pleadings were filed which were signed in the same manner. Mr. Watson took no part whatever in the preparation or management of the case, did not discuss it with the client or with his associates in the firm, and received no compensation in connection with the case. Justice Watson's appointment as a member of this court was confirmed by the United States senate on March 11, and he took the oath of office on March 19, 1914, upon which date his membership in the law firm in which he had been associated was severed. The question is whether his formal connection with the case as above explained constitutes a present disqualification. The court is of the opinion that it does.

Section 84 of the Organic Act provides that no person shall sit as a judge in any case in which he has been "of counsel."

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It was suggested at the bar that there is a distinction, which may have been in the mind of Congress, between an *attorney*, meaning and including one who may have had only a nominal connection with a case in a professional way, and *counsel*, meaning one who has or had the actual management or handling of a case. If any distinction is to be drawn we should say that an "attorney" is one who has active charge of a case, and "counsel" one who is associated with the attorney in an advisory capacity. But in this Territory, for any practical purpose, there is no distinction between an attorney and a counsellor. In the case of *In re Paschal*, 10 Wall. 483, 493, the supreme court said, "In this country, the distinction between attorney or solicitor and counsel is practically abolished in nearly all of the States. The lawyer in charge of a case acts both as solicitor and counsel. His services in the one capacity and the other cannot well be distinguished." See also *Ingraham v. Leland*, 19 Vt. 304, 307, where the court said, "There is no distinction here between counsel and attorney in a cause. Our statute attaches the same meaning to the phrase 'being of counsel,' which popular usage attaches to it, that of being concerned in a cause, or having charge of it as attorney." We think the intent of Congress as expressed in section 84 of the Organic Act, which was amended after this court had held that having previously been counsel in a cause did not disqualify a justice from sitting in a case (*Love v. Love*, 17 Haw. 194; *Notley v. Brown*, id., 393; *Bierce v. Hutchins*, 18 Haw. 374), was that a judge should not sit in a case where with reference to that case the relation of attorney and client had existed between him and one of the parties whether he was personally familiar with the case or had advised in regard to it or not. When a litigant retains a firm of lawyers in a case each member of the firm becomes the attorney or counsel for the litigant and the appearance in court of one member of the firm is the appearance of the firm. "The law which disqualifies a judge who has been of counsel in the case intends that no judge shall preside in a case in which he is

Magoon v. Lord-Young Engineering Co., 22 Haw. 245.

not wholly free, disinterested, impartial, and independent. * * * The matter is simply one of having been of counsel, and is entirely independent and distinct from any question of pecuniary interest, or of the payment of any fee or reward. * * * That the main suit of *Ambler v. Stevens* was entirely in charge of another member of the law firm in which" the judge "was a partner, does not alter the principle. What a partner does in the firm name in the pursuit of its ordinary business is done by the firm, and upon the firm's responsibility." *State v. Hocker* (Fla.), 25 L. R. A. 114, 119. See also *East Rome Town Co. v. Cothran* (Ga.) 8 S. E. 737.

Mr. Justice Watson will not participate in the hearing of this appeal.

J. A. Magoon and *C. H. Olson* for plaintiffs.

F. W. Milverton for defendant.

CLARENCE H. COOKE *v.* WADE WARREN THAYER,
SECRETARY OF THE TERRITORY OF HAWAII,
AND DAVID L. KALAUOKALANI, JR., COUNTY
CLERK OF THE CITY AND COUNTY OF HONO-
LULU, TERRITORY OF HAWAII.

RESERVED QUESTIONS FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 8, 1914.

DECIDED OCTOBER 13, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

ELECTIONS—Organic Act—amendment of election laws.

Section 85 of the Organic Act, as amended June 28, 1906, authorizing the legislature of the Territory to alter or amend the election laws of the Territory, does not authorize the legislature to provide by statute for the election of members of the legislature at a time other than that fixed by section 14 of the Organic Act for the holding of general elections.

Cooke v. Thayer, 22 Haw. 247.

SAME—primary elections—Act 151 of the Laws of 1913, construed.

The proviso contained in section 16 of Act 151 of the Session Laws of 1913, to the effect that any candidate at a primary held pursuant to the Act in the month of September who receives a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate, cannot legally apply to candidates for membership in the legislature in view of the provision of section 14 of the Organic Act that general biennial elections for members of the legislature shall be held on the Tuesday next after the first Monday in November.

OPINION OF THE COURT BY ROBERTSON, C.J.

In a petition for a writ of mandamus the petitioner averred facts showing that he possesses all the qualifications required by law to be eligible to be a member of the house of representatives of this Territory; that he was duly nominated and became a candidate for the republican nomination for member of the house of representatives for the fourth representative district at a primary election held on the 12th day of September, 1914; that (upon information and belief) there were cast for the office of member of the house of representatives from said district not more than 3900 votes of which he received 1896, which he averred constituted a majority of the votes cast and of the registered voters voting in said district at said primary election; that the respondents, though requested so to do, have refused to open the packets containing the ballots cast in said district at said primary in the presence of a justice of the supreme court, in order that the claim that the petitioner had received a majority of the votes cast for the office and of the voters voting in the district might be verified; that the respondent Thayer threatens to place upon the ballots to be used at the ensuing general election the names of six republican candidates and six democratic candidates without regard to whether they received a majority vote or not, and without any attempt on the part of said respondent to determine by an inspection of the records of said primary election whether the petitioner was

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elected to the office sought or not. The prayer of the petition was for an order directing the petitioners to open, in the presence of a justice of the supreme court, all the records received from the inspectors of election of the fourth representative district for the purpose of having the respondents determine how many votes were cast for the office of member of the Legislature in and for said district, and in order that it may be determined whether the petitioner has received a majority of all the votes cast for said office, and whether the petitioner was elected at said primary or whether his name should be placed on the ballot to be voted for at the next general election. An alternative writ was issued to which the respondents interposed a demurrer which raised certain questions which the circuit judge reserved for the consideration of this court. The answer to one of the questions being decisive of the case, we deem it inadvisable to pass upon the others, though urged by counsel to decide them. We believe no useful purpose would be served by discussing questions which are not necessary to the determination of the case in hand, and may never require decision, and the solution of which seems not to be needed to assist the executive officers in discharging their duties under the law.

The question is stated as follows: "Do the provisions of section 16 of Act 151, Session Laws of 1913, which provide as follows: 'Provided, however, that any candidate receiving the votes of a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate at such primary,' refer to or include candidates for the office of members of the legislature of the Territory of Hawaii?"

Counsel for the petitioner contends that there has been a well defined policy on the part of Congress to allow each Territory, after the first election held upon its organization, to fix by territorial law the time, place and manner of holding elections. R. S. U. S. Secs. 1847, 1848, 1863. And that the policy observed by Congress with reference to any given subject

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may properly be resorted to in construing a statute upon the subject. *Jaedicke v. United States*, 85 Fed. 372, 375; *United States v. Gay*, 95 Fed. 226; *Wisconsin Central R. Co. v. United States*, 164 U. S. 190, 204. Counsel also contends that Congress has ever evinced a desire to extend to this Territory exceedingly broad powers; that prior to the amendment of section 85 of the Organic Act, on June 28, 1906, a congressional committee had recommended that "the election laws of the Territory" be so amended and supplemented as to provide definitely for the election of a delegate to Congress, using the phrase quoted as including the provisions of the Organic Act relative to elections; and that if no power was intended to be vested in the legislature of the Territory to alter any election laws save such as were passed by the legislature the amendment referred to was a useless and idle act as the power to do so was already possessed.

Section 13, of the Organic Act provides that no person shall sit as a senator or representative in the legislature unless elected under and in conformity with "this Act;" section 14, provides that a general election shall be held on the Tuesday next after the first Monday in November, 1900, and every second year thereafter; section 36, provides that the term of office of the representatives elected at any general or special election shall be until the next general election held thereafter; section 59, provides that each voter for representative may cast a vote for as many representatives as are to be elected from the representative district in which he is entitled to vote; and section 64, provides that "the rules and regulations for administering oaths and holding elections set forth in Ballou's Compilation, Civil Laws, Appendix, and the list of registering districts and precincts appended, are," with certain enumerated changes, "continued in force."

Section 85 of the Organic Act was amended in 1906 by providing that "The legislature of the Territory of Hawaii shall have the right to alter or amend any part of the election

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laws of said Territory, including those providing for an election of Delegate to Congress, and its action shall be the law, with full, binding force, until altered, amended, or repealed by Congress." Another amendment made to that section at the same time provided that "the method of certifying the names of candidates for place on this ballot (the ballot for delegate) and all the conduct of the election of a Delegate shall be in conformity to the general election laws of the Territory of Hawaii." The attorney general, on behalf of the respondents, contends that the laws which the local legislature was given the power to amend are those which were continued in force by section 64 and referred to in the amendment to section 85, last above quoted; that it was not intended to give the legislature power to alter express provisions of the Organic Act; that the legislature has no power to change the date upon which general elections for members of the legislature are to be held under section 14; and that the provision of section 16 of Act 151 of the Laws of 1913, which provides for the election of candidates at primary elections held in September, in the event of their receiving the votes of a majority of the registered voters voting in the district, if intended to apply to candidates for membership in the legislature, was a futile attempt to change the date of the general election as to such candidates. We think the view urged by the attorney general is the correct one. The words "election laws of said Territory" taken in their general, usual and popular signification would mean the laws relating to elections enacted by the local legislative authority, and they could not except by a forced and unreasonable construction be regarded as including an act of Congress. The fact that because the local election laws in force when the Organic Act was passed had been by it continued in force and thus placed beyond the reach of the legislature of the Territory to amend makes clear beyond doubt the object of the amendment to section 85. The first section of the Organic Act provides "That the phrase 'the laws of Hawaii' as used in this Act without

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qualifying words, shall mean the constitution and laws of the Republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America." We think "the election laws" of Hawaii referred to in the amendment to section 85 were none other than such as were included in the general definition of section 1.

We hold that the proviso contained in section 16 of the primary law cannot legally apply to candidates for membership in the legislature. Our answer to the first question reserved is in the negative.

R. W. Breckons for petitioner.

I. M. Stainback, Attorney General, for respondents.

M. F. SCOTT AND NETTIE L. SCOTT v. ESTHER N. PILIPO, ET AL.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 6, 1914.

DECIDED OCTOBER 13, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

PLEADING—*new parties*.

The plaintiff in a partition suit presented a supplemental bill and motion seeking to have A made a party defendant, alleging that he, during a portion of the time the suit had been pending, had collected certain rents for a moiety of the land, but did not show that he was a lessee or otherwise interested in the subject matter of the suit; an order directing A to show cause why he should not be made a party defendant was made, and he appeared specially and moved that the order be vacated which was done: Held, that the order to show cause was properly vacated.

PARTIES—*partition—lessees*.

While the lessee of a cotenant of land sought to be partitioned is a proper party to a suit for partition, the rule does not extend to one who is merely shown to have collected rents without showing that he is interested in the subject matter of the suit.

Scott v. Pilipo, 22 Haw. 252.

OPINION OF THE COURT BY QUARLES, J.

This is an appeal from an interlocutory order made by the third judge of the first circuit sitting in chambers in a partition suit. The suit has been pending for many years. One of the plaintiffs presented a supplemental bill, and a written motion for an order requiring one, C. K. Ai, to appear and show cause why he should not be made a party defendant to the suit. The order was made, and in response thereto, said Ai appeared specially and moved that the order be vacated on the ground that under the showing made in the supplemental bill he is not a proper or necessary party, and the circuit judge had no jurisdiction to make the order to show cause. This motion was sustained and the order to show cause vacated, from which this appeal was allowed by the circuit judge.

On behalf of the plaintiffs it is contended that the supplemental bill states facts showing that said Ai as claimant and holder of a leasehold interest in undivided shares of the land sought to be partitioned is a necessary and proper party. If this contention is true, said Ai is interested in the subject matter of the action, and is a proper party to the action and should be brought in. (R. L. Sec. 1738; *Pond v. Montgomery*, ante page 241; *Johnson v. Aleshire*, 114 N. Y. Supp. 398; *Thruston v. Minke*, 32 Md. 571; Freeman on Cotenancy and Partition §480.) On behalf of said Ai it is contended that the allegations of the supplemental bill show that the only object for bringing said Ai in as a party defendant is to obtain a money judgment against him. These contentions, and the order setting aside the order to show cause, must be decided upon the allegations of the supplemental bill, which is inartificially drawn. We quote those portions of the supplemental bill necessary to a determination of the questions before us. "Complainant alleges, that on date of February 21, 1896, C. Akau, who was one of the original parties defendant to this suit, made a lease of 22 acres, more or less, for a term of twenty years, in that part of the undivided lands within the belt makai of and

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adjoining the upper government road, to Hamada, Kudia and Hakodo (Japanese), a copy of which lease is hereto attached, marked Exhibit 'A,' and by reference made a part hereof; that on date of June 24th, 1901, the aforesaid lessees, to wit, Hamada, Kudia and Hakodo, assigned and conveyed their interests in said lease to Tsuruda, who on date of January 24, 1904, conveyed the same to Harano, who has submitted himself to the jurisdiction of this Court, and who is still a party defendant; that on date of December 20, 1909, the said Harano conveyed a part of the interests of the aforesaid leasehold theretofore conveyed to him by Tsuruda as aforesaid, to We Tai Yuen, and that on other dates, either prior or subsequent to said date of December 20, 1909, the said Harano conveyed all other interests in and to said leasehold agreement to S. Yamaguchi and C. Taikao, who, the said We Tai Yuen, S. Yamaguchi and C. Taikao, have all submitted themselves to the jurisdiction of the Court and are parties defendant in this suit. * * * Complainant alleges, that neither Kamale 1, nor Kamale 2, either jointly or severally, had power to lease to C. Akau, the land, which said C. Akau sublet to Hamada, Kudia and Hakodo for a term of twenty years by the indenture of agreement, dated February 21, 1896, Exhibit 'A' hereto, and in which indenture of leasehold agreement, the lessor, C. Akau, recites that the premises he, the said C. Akau, was subletting, were the same premises leased to him, the said C. Akau, by Kamale 1 and Kamale 2, both of them members of the Hui. Complainant further alleges, that at all times since the formation of the Hui, the said Kamale 1 and Kamale 2, or their representatives or assigns, have been in possession of Hui lands, other than that set out by C. Akau, as having been leased by them to him, as aforesaid, in excess of the area to which, by the usages and customs of the Hui, they, the said Kamale 1 and Kamale 2, were entitled to use or occupy; that the premises described as sublet by said C. Akau, in said agreement, Exhibit 'A' hereto, were premises under control and belonging to the Hui, and that all rentals col-

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lected under and by virtue of aforesaid indenture of agreement, to wit, Exhibit 'A' hereto, and paid by parties using the premises described in said agreement, and paid as rentals under and by virtue of said agreement, were rentals belonging to the Hui, and the party so receiving said rentals, received such as trustee for the Hui, and is liable to account to the Hui for the same. Complainant alleges, that since the year 1907, the said Harano, or his assigns, the said We Tai Yuen, S. Yamaguchi and C. Taikao, described in paragraph III hereinbefore, as successors of Hamada, Kudia and Hakodo, through Tsuruda, have occupied and used as tenants, under and by virtue of the aforesaid leasehold agreement, dated February 21, 1896, Exhibit 'A' hereto, the premises described in said agreement; and that since said year 1907, they, the said Harano, We Tai Yuen, S. Yamaguchi and C. Taikao, have attorned in payment of rent for the use of said premises to said C. K. Ai, herein complained of, and have paid to said C. K. Ai, as rentals for the use of said premises, a total sum of \$1210.00, an itemized statement showing the several amounts making said total, and the date of payment of each several amount, is hereto attached, marked Exhibit 'B', and by reference made a part hereof. Complainant further alleges, that since the year 1907, the said C. K. Ai, claiming as successor of original lessor, or successor of successors of original lessor, has attorned as lessor under and by virtue of aforesaid leasehold agreement, Exhibit 'A' hereto, to said Harano, We Tai Yuen, S. Yamaguchi and C. Taikao, and has claimed and collected as rents for the use of said premises described as being sublet by C. Akau in the said leasehold agreement, Exhibit 'A' hereto, the several amounts set out in the statement, Exhibit 'B' hereto." The relief prayed for against said C. K. Ai is "That upon hearing and proof of all or sufficient of the allegations hereinbefore, that said C. K. Ai may be ordered to pay into Court for the benefit of all the members of the Hui, all sums collected and received by him as rentals for the premises described" etc.

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It is thus seen that the plaintiff alleges that since 1897 Harano, We Tai Yuen, S. Yamaguchi and C. Taikao have attorned in payment of rent for the use of said premises to said C. K. Ai, and that said Ai has attorned as lessor to said Harano, We Tai Yuen, S. Yamaguchi and C. Taikao. Just what was in the mind of the pleader in using the word attorn, especially in the last instance, is somewhat in doubt. Under the feudal laws of England the lord could not alienate his estate without the consent of his tenant, and in the latter case the lord, his grantee and the tenant appeared before the *paries curiae* or court baron, and signified the turning over from the former lord to the new one. (Wash. R. Prop. 6th ed. Secs. 69, 83.) A tenant attorns when he, during the term of his lease, takes a lease from a person other than his landlord. The signification of the word in modern legal usage is: To transfer or turn over to another; to assign to some particular use or service. (Bouvier's Law Dict.; *Eichelberger v. Sifford*, 27 Md. 320, 330.) If A attorns to B, and B attorns back to A, each would seem to be in the same position as he was in before there was any attornment. Whether Ai has collected rents as owner of a leasehold under original cotenants or members of the Hui, or merely for some other purpose, or under a claim adverse to all, or has collected such rents without claim of right, is not sufficiently shown in the supplemental bill. In order to show that he is a proper party to the suit something must be shown further than the mere collection of rent. While a lessee of one of the owners of undivided lands is a proper party to a suit for partition, the rule does not extend to a stranger who wrongfully collects rents for a portion of the lands and against whom the owners have their remedy at law.

The order appealed from is affirmed, with costs to the appellee.

M. F. Scott for plaintiffs.

W. L. Stanley (*Holmes, Stanley & Olson* on the brief) for defendant C. K. Ai.

SARAH AHOI v. J. C. PACHECO.

APPEAL FROM DISTRICT MAGISTRATE OF NORTH KONA.

SUBMITTED OCTOBER 17, 1914.

DECIDED OCTOBER 24, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

JUDGMENT—*partition—res adjudicata—replevin*.

K, one tenant in common, built a house on the undivided lands, after which, in partition, the land upon which the house stood was allotted to another cotenant without reservation to K of the house; held, the decree is *res adjudicata*, and binding upon K.

OPINION OF THE COURT BY QUARLES, J.

Plaintiff commenced an action in the district court of North Kona, in replevin, to recover possession of a certain house situated on the land of Holualoa 1, alleged to be personal property of the value of \$250, together with \$30 damages for alleged unlawful detention by defendant. The defendant filed a plea in bar which, after amendment, was based on the ground that the suit being for recovery of real estate the court had no jurisdiction. The plea was not supported by affidavit as required by Rule 15 of this court and the district magistrate properly overruled the same. At the trial the plaintiff testified that the house was built by her husband, Kaiawe, since deceased; that she had bought the house from all of the heirs of Kaiawe and had possession of it until June 8, 1914; that she learned that the land on which the house was situated had been allotted to defendant, asked his permission to remove the house which he refused, and that defendant took exclusive possession of the house on June 8, 1914, and has held same ever since; that she had been damaged in consequence thereof in the sum of \$30. One other witness testified to plaintiff's having asked defendant's permission to move the house. The parties filed a stipulation of facts from which it appears that the lands of the ahupuaa of Holualoa 1 and 2 were for a number of years prior

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to the beginning of the action held by tenants in common; that a suit to partition same was commenced in equity in the first judicial circuit and an interlocutory decree of partition entered early in the year 1914 partitioning a portion of said lands; that Kaiawe was one of the tenants in common and died prior to the decree of partition; that said Kaiawe built the house and that plaintiff had bought the interest of all of his heirs in the house; that plaintiff and defendant were tenants in common with others in the land prior to the partition and both are allottees in the said decree of partition; that the particular portion of said lands upon which the house stands was allotted in said interlocutory decree to the defendant. The district magistrate gave judgment for the plaintiff for the restitution of said house, one dollar damages and costs, from which the defendant has appealed to this court on points of law which are, in effect, that the house, not having been severed from the realty, is not subject to replevin, and that the partition decree is *res adjudicata*. The defendant in proper person has filed a brief. There is no appearance for the plaintiff.

The general rule is that a house built upon land becomes appurtenant thereto and a part thereof,—in other words, becomes realty. To this rule there are some exceptions. If one tenant in common builds a house upon the undivided lands with the understanding on the part of his cotenants that the house should not become a part of the land and could be removed at the will of the tenant erecting it the law would treat it as personal property, but no showing of that kind is made here. The plaintiff and defendant are both parties to the partition suit and both are bound by the interlocutory decree so long as it remains in force. The identical portion of the land upon which the house stands having been allotted to the defendant, without reservation to the plaintiff of the house, said house must be regarded as part of the land and the question of its ownership as *res adjudicata*. It therefore follows that the judgment of the district court was erroneous.

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The judgment is reversed with costs to the appellant and the case is remanded to the district court with instructions to enter judgment in favor of the defendant.

No appearance for plaintiff.

Defendant in proper person.

JOHN D. EASTON, TRUSTEE IN BANKRUPTCY OF
WILLIAM F. DESHA AND GEORGE WILLFONG,
EACH IN HIS INDIVIDUAL CAPACITY AND AS
PARTNERS FORMING THE PARTNERSHIP OF
DESHA AND WILLFONG, v. N. C. WILLFONG.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

ARGUED SEPTEMBER 22, 1914.

DECIDED OCTOBER 26, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

BANKRUPTCY—*preferential transfer.*

A suit by a trustee in bankruptcy to set aside a transfer by a bankrupt as a voidable preference held not to be a suit to recover on the ground of fraud.

SAME—*insolvency—burden of proof.*

In a suit by a trustee in bankruptcy to set aside a transfer by a bankrupt as a voidable preference, the burden of proof is on the plaintiff to establish the insolvency of the bankrupt at the time of the transfer.

SAME—*books of bankrupt as evidence—individual debt of partner.*

The books of a bankrupt are evidence on the question of insolvency within four months of the date of filing the petition, but they are not conclusive, for they may be incomplete, incorrect or fraudulent. An individual debt of a member of the firm is none the less such because it is entered on the firm books, and while such entry may constitute a *prima facie* showing that the indebtedness therein referred to is a firm liability, such showing may be overcome by other satisfactory evidence.

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SAME—*schedules of bankrupt as evidence.*

In a contest between a trustee in bankruptcy and one sought to be charged as a creditor having received an unlawful preference, the schedules of the bankrupt in the bankruptcy proceedings are admissible in evidence on the issue of insolvency.

SAME.

Evidence considered, and held that it is not satisfactorily shown in this case that the alleged preferred creditor had at the time of the transfer reasonable cause to believe that the transfer would result in a preference.

OPINION OF THE COURT BY WATSON, J.

This is an appeal from a decree made by the circuit judge of the fourth circuit sitting at chambers in equity declaring a certain transfer of sixteen promissory notes, each in the sum of \$75, and a chattel mortgage securing the same, by George W. Willfong to the defendant, to be null and void as an unlawful preference under section 60b of the Bankruptcy Act as amended. These notes and the chattel mortgage, prior to the date mentioned, were the property of the copartnership of Desha and Willfong, having been received by that firm on account of the purchase price of a certain automobile sold by the company to one Kenichi Doi, the maker of said notes and mortgage. On or about the first day of July, 1912, William F. Desha and the said George W. Willfong formed a partnership in the business of dealing in automobiles, their fittings and accessories, and doing a general repairing and vulcanizing business in connection therewith at Hilo in the county and Territory of Hawaii under the name of Desha and Willfong, pursuant to a partnership agreement by the terms of which said William F. Desha was to contribute \$5000 and the said George W. Willfong the sum of \$1000 as the capital of said copartnership. The said George W. Willfong contributed his share of the said capital to the said copartnership, having borrowed the \$1000 from his father, the defendant herein, just prior to the commencement of the partnership business. Desha contributed his share of the partnership capital, having obtained the money from a Mrs.

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B. M. Allen, who has since died. In carrying out the purposes for which said partnership was formed the firm equipped a machine shop and garage and purchased materials and supplies. The books kept by the firm were inaccurate and incomplete from the very inception of the partnership. It appeared to the partners that business was good from the start and they believed that the undertaking promised to be a thriving one. A few weeks after the commencement of the business George W. Willfong became dissatisfied with the conduct of his partner and complained of his inattention to the business and his drawing checks against the firm account for his personal use, and particularly because Desha was doing so without having first informed him, Willfong, of his intention so to do. However, the withdrawal of these sums did not at any time embarrass the copartnership and the partners believed that the business was being carried on at a profit. The conduct of Desha was such that Willfong determined to dissolve the copartnership and along about the first of September, 1912, or in August, he proposed that his partner buy him out, to which proposition Desha assented and asked Willfong to wait until he could procure some money from Mrs. Allen, who seems to have been his financial backer. In the meantime Willfong was attending to the business while Desha was in Honolulu, claiming that he was there arranging to raise some money for the purpose of buying out the interest of Willfong. While Desha was in Honolulu, and a few days before the dissolution of the partnership, a check or draft in the sum of \$1000 was presented to Willfong, drawn by Desha, payable to F. E. Davis & Co., which had been given by Desha as a payment on a vulcanizing plant purchased by Desha in his own name and without the knowledge of Willfong. Willfong refused to pay the check or draft and it was returned by Bishop & Co. dishonored. On September 18, 1912, a little over two months after the formation of the copartnership and immediately upon Desha's return from Honolulu, the partnership was dissolved, a dissolution agreement in writing being

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entered into by the partners on that day, Willfong accepting as his one-sixth interest in the business the promissory notes and chattel mortgage hereinabove referred to. The notes were endorsed to Willfong by the firm and Willfong under the dissolution agreement transferred all his interest in the remaining partnership accounts to his former partner, who, in consideration thereof, assumed the payment of all the firm liabilities. Willfong then transferred the said notes and mortgage to his father, the defendant herein, in payment of his indebtedness to him. He had no other individual obligation except in so far as he was individually liable for the debts of the firm. On September 19, the day following the dissolution of the copartnership and the transfer of the notes and mortgage in question, an action was brought against the copartners by said F. E. Davis & Co., and the property of the former firm, then in the possession of Desha under the dissolution agreement, was attached in that action. The closing of the business of Desha by this attachment precipitated similar proceedings by other creditors and upon the levy of the execution issued upon the judgment obtained in one of these actions involuntary bankruptcy proceedings were predicated. A petition in bankruptcy was filed against the firm and members thereof on November 18, 1912, but owing to resistance made by the alleged bankrupts to the proceedings by their denial of insolvency the adjudication did not take place until May 27, 1913, on which date the firm and the individual members thereof were adjudicated bankrupt. On June 21, 1913, the plaintiff, John D. Easton, by a proper order entered in said bankruptcy court, was duly appointed trustee in bankruptcy of the said firm and of each of the partners. The present suit was brought by the plaintiff under authority of an order made by the referee in bankruptcy having jurisdiction of the bankruptcy proceedings. Plaintiff's bill of complaint herein contains the averments usual in a suit to set aside a transfer by a bankrupt as a voidable preference under section 60b of the Bankruptcy Act and, it is contended by plain-

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tiff in this court in his brief, certain other allegations which attack the transfer as being one to hinder, delay and defraud creditors within the meaning of section 67e of the Bankruptcy Act.

It is obvious from an inspection of the record that the case was tried below on the theory that the transfer was complained of as being a voidable preference only and it was on this ground that the circuit judge predicated his decision and decree in plaintiff's favor. The decree can be sustained, if at all, only as one setting aside a voidable preference under section 60b of the Bankruptcy Act. The trial judge found no actual fraud on the part of the defendant or the bankrupt in the accepting or the making of such transfer, and in our opinion, from the evidence adduced, no such finding would have been warranted. It is found as a fact by the circuit judge and conceded by the plaintiff that the transfer was made to pay a pre-existing indebtedness due by the bankrupt to the defendant, that is to say, the sum of \$1000, borrowed by George W. Willfong from his father for the purpose of enabling him to enter into the partnership business. A transfer in good faith to pay an honest antecedent debt is not of itself sufficient to establish actual fraud in fact, or an intent on the debtor's part, or on the part of the creditor, to hinder, delay and defraud other creditors within the meaning of subsection 67e. Collier on Bankruptcy (10 ed), p. 957.

"The transfers prohibited by 67e are only those fraudulent and therefore voidable at common law, or, what is the same thing, such as constitute acts of bankruptcy under section 3." *Wright v. Sampter*, 152 Fed. 196, 199, citing *In re Bloch*, 142 Fed. 674. "There is a marked distinction between a 'preferential payment' and a 'fraudulent conveyance.' Every preferential payment must to some extent hinder and delay creditors but it is not necessarily a fraudulent conveyance. * * * A preferential payment may be constructively fraudulent but it is not in and of itself a fraudulent conveyance. It can only become

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the latter in the unusual case where actual fraud in addition to the preferences is established. Thus a secret trust in favor of a person making such payments might turn a mere preference into a fraudulent conveyance. But there is no proof in this case of any intent to hinder or defraud creditors more than the preferential payments in themselves would have hindered them." *Van Iderstine v. National Discount Co.*, 174 Fed. 521, 522, affirmed 227 U. S. 575; *Sargent v. Blake*, 160 Fed. 57, 61. "To avoid this transfer under section 67e of the Bankruptcy Act it is incumbent upon the complainant to show actual fraud in fact in the conveyance of the property * * * as distinguished from constructive fraud." *Meservey v. Roby*, 28 A. B. R. 529, 534.

The allegations contained in plaintiff's bill as to the relationship between George W. Willfong and the defendant, the youth of George W. Willfong, the transferor, and the showing that the bankrupt was stripped of his entire property by the transfer, are not sufficient, as contended by plaintiff, to bring the bill within the provisions of section 67e, and as already stated, the complaint must be treated as having been framed under section 60b of the Bankruptcy Act. Proof of the allegations referred to would not establish the intent to hinder, delay and defraud contemplated by the provisions of section 67e; such proof would be evidence to be considered with all the other facts in the case (*Wright v. Sampter*, supra, 200), and on the whole evidence we are of the opinion the transfer could not be avoided under section 67e of the Bankruptcy Act.

On this appeal the contentions advanced by appellant may be summarized under two general heads: (1) failure of proof to show that at the time of the transfer complained of Desha and Willfong were insolvent; (2) failure of proof to show that at the time of the transfer in question the defendant had reasonable cause to believe that the said transfer would result in a preference.

Perhaps the most important claim advanced by counsel for

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plaintiff under the first contention relates to an indebtedness of \$5600 appearing on the books of the firm as a partnership liability due to a Mrs. Allen, but which defendant claims was in reality an individual indebtedness due by William F. Desha, one of the partners. On this point the trial judge made the following findings: "At the time of the dissolution of the copartnership its assets were of the value from \$4800 to \$5200, and its liabilities, exclusive of an indebtedness to Mrs. Allen, which will require separate consideration, were \$3781.50. Certain evidence was introduced by the defendant tending to show that the firm owed nothing to Mrs. Allen but that the amount advanced by her, viz., \$5600, was by way of a loan to William F. Desha, one of the partners. This evidence, however, is not convincing in view of the fact that William F. Desha was not called to testify in regard to the transaction, nor his failure to give testimony accounted for, and in view of the further fact that the \$5600 was entered in the handwriting of George W. Willfong in the books of the firm as a firm liability. In view of these circumstances * * * the court finds that the indebtedness to Mrs. Allen was a firm indebtedness, making the liabilities of said concern \$9381.50." The importance of this question is readily discernible when it is observed that if this indebtedness were not a firm liability, but the individual liability of Desha, the assets of the firm at the time of the transfer, as found by the trial judge, were in excess of the firm liabilities and the copartnership was not insolvent. Counsel for plaintiff admitted at the bar of this court that in the event this indebtedness to Mrs. Allen was not shown to be a firm liability his action must fail. The only evidence in the record tending to prove that this indebtedness to Mrs. Allen was a firm obligation is the ledger of the firm, introduced in evidence by plaintiff, in which the account of Mrs. C. A. Allen is stated, showing a credit balance due her of \$5600, with nothing to indicate that the account is not a firm account, and with nothing to distinguish it from the other accounts, admittedly firm accounts, appearing

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in that book. The account is stated as follows: "Mrs. C. A. Allen 1912 July 23 \$2500 —16 \$500 Sept 9 \$2600" As against this showing contained in the firm's ledger there is the evidence of George W. Willfong who testified that it was he who kept the books of the firm; that the indebtedness as shown by this account with Mrs. Allen consisted of personal loans to Desha individually; that he noted the account in the ledger at the special request of Desha who told him that he wanted a record kept of his loans and these items so noted were regarded as Desha's personal account. This witness was called to the stand by the plaintiff and it was on his direct examination that this testimony was elicited. The defendant, also called as a witness by plaintiff, testified that Mrs. Allen never loaned the firm any money; "it was Willie" (meaning Desha). "How do you know that Mrs. Allen loaned Desha some money?" Witness: "I don't know whether she loaned it to him. She gave him money, whether as a present or loan I don't know. I know she gave him money; he told me himself and George did." While this testimony of the defendant appears to have been hearsay and might have been properly stricken out on motion, it was brought out by plaintiff from a witness called by him, and was permitted to remain in the record. "The books of a bankrupt are evidence on the question of insolvency within four months of the date of filing the petition. They are not conclusive upon this subject for they may be incomplete, incorrect or fraudulent, but ordinarily they are important evidence and entitled to much weight. The schedule and the inventory and appraisal are also evidence upon the same question." *In re Docker-Foster Co.*, 123 Fed. 191; *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 633, 639. Plaintiff himself testified that the books of the firm were not in very good shape, and George W. Willfong, called as a witness by plaintiff, testified that he had kept the books of the firm but there were incorrect entries and mistakes therein. The burden of proof was on plaintiff to establish, among other things, the insolvency

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of the firm at the time of the transfer (*In re Carlile*, 199 Fed. 613, 617; *Tumlin v. Bryan*, 165 Fed. 166), and we think with respect to this indebtedness due to Mrs. Allen, proof of which was vital on the question of such insolvency, he has not satisfied that burden. The circuit judge, as shown by the excerpt from his decision above quoted, seems to have taken the view that the burden was on defendant to show that this Allen indebtedness was not a firm liability and that therefore the firm was not insolvent. The Bankruptcy Act does not place the burden of proving the solvency of his debtor upon one who is charged with having received a preferential payment from an alleged insolvent. The very reverse of this is true. *Baden v. Bertenshaw*, 68 Kan. 32, 36. Nor was it incumbent on the defendant to call William F. Desha to testify in regard to the transaction. The evidentiary value of the book entry showing this indebtedness as a firm liability is greatly diminished by the testimony of the plaintiff that the books were not kept in good shape and the testimony of George W. Willfong that the books contained incorrect entries. Assuming, however, that the book entry constituted a *prima facie* showing of this indebtedness to Mrs. Allen as a firm liability, we are of the opinion that such showing was overcome by the testimony of George W. Willfong and the defendant above referred to, and we think the plaintiff failed to prove that at the date of the transfer the firm of Desha and Willfong was insolvent. An individual debt is none the less such because it is entered on the firm books. *Collier on Bankruptcy* (10 ed) 194; *Hibberd v. McGill*, 129 Fed. 590.

On the trial of the cause defendant's counsel offered in evidence the schedule of the bankrupts, prepared and filed by Desha, one of the members of the firm. The schedules were offered on the question of insolvency generally and among other things for the purpose of showing that the Allen indebtedness, above referred to, had been scheduled by William F. Desha, the partner who prepared the schedules, as his individual liability, for which he had given his notes to Mrs. Allen. On objection

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by plaintiff's counsel the schedules were excluded from evidence. The schedules of the bankrupts should have been admitted in evidence. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 633-639; *Lowell on Bankruptcy*, Sec. 98; *Credit Men v. Furniture Co.*, 26 A. B. R. 874; *In re Docker-Foster Co.*, 123 Fed. 191; *Collier on Bankruptcy* (10 ed) 792.

Did the defendant have reasonable cause to believe upon the facts known to him that the transfer would result in a preference? We think not. "In a suit by a bankrupt's trustee to recover a preference alleged to be voidable, Bank'r Act July 1, 1898, * * * the burden of proof is on the trustee to show that the bankrupts were insolvent when the transfer was made and that the creditor had reasonable ground to believe that the enforcement of the transfer would effect a preference." *In re Carlile*, supra, p. 613. The findings of the trial judge upon this issue, as contained in his decision, are as follows: "The evidence shows that N. C. Willfong, the defendant herein, because of his financial interest and because of his relationship and intimacy with the said George W. Willfong, was in a position to know of the financial condition of the firm during its existence. It was shown that he occasionally visited their place; that on at least two occasions he endorsed their paper and that he was in daily communication with his son. The defendant's claim appears in a schedule of creditors filed with the referee in bankruptcy in the bankruptcy proceeding above referred to." As will be seen, one of the elements upon which the trial judge based his conclusion as to defendant's knowledge of insolvency was the fact that the defendant had endorsed the firm's paper on at least two occasions. From the evidence it appears that the first occasion was on July 1, 1912, when he endorsed the note of the firm for \$500. This was about the time the partnership commenced business, and when the firm dissolved this note had not yet become due. The other occasion upon which defendant endorsed the firm's paper was on the 7th day of September, 1912, eleven days before the transfer complained of, when he

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endorsed a note for the firm in the sum of \$2600. In the case of *Sparks v. Marsh*, 177 Fed. 739, where it was sought to recover an alleged preference, the court found that the bankrupt was insolvent at the time of the preference and that the payment in question was intended by the bankrupt as such. There was proof as to the business and friendly relationship that had existed between the bankrupt and the defendant and the latter's familiarity with the business of the bankrupt and as to financial transactions between the parties concerning said business, and it was claimed that that proof was of such a nature as to raise a presumption that the defendants knew of the bankrupt's financial condition, which presumption, it was further claimed, was so strong as not to be overcome by the defendant's denial of such knowledge. The opinion contains the following at page 742: "But there is no direct evidence to show that fact (knowledge of insolvency) but mere surmises arising, it is claimed on behalf of the complainants, from the circumstances shown to have prevailed at the time. * * * While the personal relations existing between the parties might raise the presumption that the defendants knew White's financial condition, this presumption is satisfactorily rebutted by the fact that they endorsed a note for one thousand dollars only a month before that time. These acts are certainly strong circumstances to dispel the presumption of knowledge of insolvency, for it is hardly reasonable to suppose that they would have become the endorsers of the note for one thousand dollars if at the time they doubted his insolvency and consequent ability to pay it at maturity." Practically the same argument is advanced in this case as was urged in the *Marsh* case, *supra*, plus the relationship between the parties, the youth of the transferor, etc., but in our opinion the fact that the defendant endorsed the firm paper for \$2600 on September 7, 1912, just eleven days before the transfer complained of was made, is a strong circumstance to dispel the presumption of knowledge of insolvency. Defendant denied that he knew or believed the firm to be insolvent. His evidence, cor-

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roborated by that of his son, was that he had visited the place of business of the firm on one or two occasions; that he never examined the books of the firm or attempted in any way to participate in the firm's management; that he had absolute confidence in his son and that when he asked his son how the business was getting along, his son replied, "All right." The firm was at that time employing from two to four extra men in the business and one of these men told the defendant that the company had a lot of work to do in the shop. The storeroom and shop at all times presented a busy appearance when defendant called or was passing, and from the evidence as a whole we are convinced that George W. Willfong believed, erroneously, as subsequent events have disclosed, that the business was being profitably conducted. This belief was communicated by George W. Willfong to the defendant and was shared in by him. Defendant knew of the dissatisfaction that existed on his son's part with the conduct of Desha, his partner, and knew that his son contemplated making a sale of his interest in the business to Desha. When the notes and chattel mortgage were turned over to him by his son in payment of the one thousand dollar debt due him, defendant knew that the dissolution had been effected by the partners and that in conformity with the dissolution agreement entered into between the partners his son had received these notes and the mortgage in full satisfaction of his one-sixth interest in the business. He also knew that all of the other assets of the firm, under the dissolution agreement, were turned over to Desha and that Desha had assumed the payment of all liabilities due by the firm. At that time no suits were pending against the firm and so far as defendant had reason to believe the business was solvent. With his knowledge of the fact that six thousand dollars had been contributed as the capital of the partnership only about two months before that time and that his son owned a one-sixth interest in the business he had no reason to believe that these notes, endorsed to his son by the firm and by his son turned over to him in payment of

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the debt due him, represented anything more than a fair value of his son's interest in the business as *bona fide* agreed on between the partners in their dissolution negotiations. Defendant knew that owing to his son's openly expressed dissatisfaction with his partner's conduct the relations at that time existing between the partners were not particularly friendly and certainly he had no reason to believe that Desha, in buying out his son's interest in the business and assuming the liabilities of the old firm, had paid for such share more than it was reasonably worth, or permitted George W. Willfong to withdraw from the assets of the firm more than the fair value of such interest. From the entire evidence we are of the opinion that all defendant knew was entirely consistent with the business conclusion that the firm was solvent and that upon the dissolution Desha in consideration of the firm's assets being turned over to him had assumed the liabilities of the business and paid his son \$1200, as represented by the notes, for his share and interest therein. "As to the meaning of the phrase 'having reasonable cause to believe' * * * dicta are not wanting which assume that it has the same meaning as if it had read 'having reasonable cause to suspect,' but the two phrases are distinct in meaning and effect. It is not enough that the creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief as to his debtor's insolvency in order to invalidate a security taken for his debts." *Grant v. National Bank*, 97 U. S. 80, 81; *Fairer v. Hackfeld & Co.*, 14 Haw. 209, 212.

Even though we assume that the partners and the partnership were insolvent on September 18, 1912, we think the facts in this case bring it fairly within the reasoning of *Sargent v. Blake*, 160 Fed. 57, in which case the circuit court of appeals for the eighth circuit, held, *inter alia*: "When all of the partners consent, their application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, and while the

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partners and the partnership are insolvent, does not evidence any intent to hinder, delay or defraud the creditors of the partnership within the meaning of section 67e of the bankruptcy law. Act July 1, 1898. * * * And it is not void or voidable where the creditor paid has no reasonable cause to believe that a preference was intended thereby."

For the reasons given the decree appealed from is reversed and the cause remanded with directions to dismiss the bill.

C. S. Carlsmith for plaintiff.

J. W. Russell (*R. W. Breckons* with him on the brief) for defendant.

THE COUNTY OF HAWAII *v.* WILLIAM PURDY AND
THE UNITED STATES FIDELITY & GUARANTY
COMPANY OF BALTIMORE, MARYLAND.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED SEPTEMBER 21,

AND OCTOBER 19, 1914.

DECIDED NOVEMBER 2, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

COUNTIES—*board of supervisors—committee.*

The power of a county to do ordinary business, and to buy and sell property, is vested in its board of supervisors which may, through one of its members, acting as a committee, sell property, and supervise road work in a given district.

SAME—*presumption from an agreed custom.*

It having been stipulated by the parties that P, a member of the board of supervisors for the district of H, sold certain crushed rock; supervised the road work in his district; made up false pay-rolls for road work; approved same and presented them to the board of supervisors which allowed same, after which he received and cashed warrants for the fraudulent claims, and converted money from such sales and fraudulent claims; and, that he acted under a custom existing in the county under which a

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supervisor made such sales, supervised road work in his district and looked after the pay-rolls, the law presumes, in the absence of any showing to the contrary, that the board of supervisors had authorized him, as a committee of the board, to make such sales, and supervise such road work, and look after the pay-rolls therefor; and that he was acting in a matter in which he was authorized to act.

PRINCIPAL AND SURETY—*liability of surety—county supervisor.*

Where the bond of a county supervisor is conditioned that he will faithfully perform the duties of office prescribed by law, and pay over as directed by law all moneys received by virtue of his office, his surety is liable for money which he receives while acting in a matter in which he is authorized to act, if he wrongfully misapplies such money; as, in doing so, he is not faithfully performing his duty as a county supervisor, but guilty of official misconduct.

OFFICERS—*bond—surety.*

Where an officer acting in a matter in which he is authorized to act, is guilty of official misconduct, he is not faithfully performing his official duties, and he and his surety are liable for resultant damages on his official bond.

PLEADING—*defective, aided by stipulation of facts and judgment.*

A complaint was defective in that a material fact was not alleged; defendant answered; at the trial the material fact, with other facts, was stipulated, without objection; the plaintiff recovered judgment. Held, that the defect was cured by the stipulation and judgment.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced this action against the defendant Purdy as principal and The United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, upon two official bonds given under the provisions of Act 39, Session Laws 1905, known as the County Act. The bonds were executed in the form prescribed in section 25 of said act, one approved by the circuit judge of the fourth circuit on the second day of January, 1911, and the other approved January 6, 1913. In each the conditions are stated as follows: "Now Therefore, if the said bounden William N. Purdy shall faithfully perform all the duties of his said office as prescribed by law; shall safely keep all moneys which may come into his possession by virtue of his

said office; shall promptly pay over to the person or persons legally authorized to receive the same all such moneys in the manner prescribed by law; and shall deliver over to his successor in office all moneys held by him as such officer; then this obligation to be null and void; otherwise to remain in full force and effect." The defendant Purdy did not defend the action and does not join in prosecuting this appeal. The cause was submitted to the court without a jury upon the pleadings and an agreed statement of facts covering eight typewritten pages, which may be summarized as follows: The defendant Purdy was elected supervisor for the Hamakua district in the county of Hawaii in November 1910, and again in November 1912, and qualified under each election, executing, with the other defendant named, the two bonds sued upon in this action, the first of which was in force and effect from January 2, 1911, until the sixth of January, 1913, the latter from January 6, until August 6, 1913. In the year 1912, the defendant Purdy, claiming to represent the county of Hawaii, and "in accordance with a custom which had prevailed in the county of Hawaii of permitting members of the Board of Supervisors to enter into similar contracts," sold and delivered to the Paaauhau Sugar Plantation Company certain rock which had been quarried and crushed by the county and with labor paid for by the county, receiving therefor sums aggregating \$1625, which he retained and converted to his own use and failed to pay over to the county. That a custom had prevailed in the county, from its organization, under which supervisors from the several districts of the county assumed general control and supervision over the building, maintenance and repair of public roads, and the employment of labor therefor, in the district from which elected, and in accordance with said custom the defendant Purdy within the dates mentioned in the complaint did place upon the pay-rolls of said district the names of certain persons who did not work upon any road for the said county; that he signed the names of such persons to said pay-rolls, approved said pay-rolls

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which were approved by the board of supervisors of the county, procured warrants for the amounts shown on said pay-rolls, and endorsed and collected said warrants, all aggregating the sum of \$1177.50, in all of which acts he claimed to represent the county, and the persons dealing with him so understood. That demand had been made of him for payment of all of said sums, and also of his said surety, but none of the same had been paid. Upon the pleadings and agreed facts the circuit court found in favor of the plaintiff, and rendered judgment as demanded for the sum of \$2802.50, with interest and costs. The defendant surety company brings the case here upon exceptions which challenge the correctness of the findings and judgment of the trial court, principally upon the ground that the acts of the defendant Purdy, shown by the complaint and agreed facts, were done by color of office and not by virtue of office, and the judgment therefore is contrary to law and the evidence.

This case has been ably presented by the respective parties by written briefs and oral arguments. A large number of authorities have been cited on behalf of the respective parties, it being urged on behalf of the defendant surety company that the acts of the defendant Purdy complained of, were not done by virtue of office, but under color of office, and therefore, the same did not constitute breaches of the bonds sued on. The questions raised call for an inquiry into the powers and duties of county supervisors. The defendant contends that county supervisors can only act conjointly, or as a board; that an individual supervisor cannot sell county property, nor do any act that will bind the county, and therefore the acts of defendant Purdy in question do not constitute breaches of the conditions of the said bonds for which the defendant surety is liable; that sureties are favored in the law, and the conditions of their undertaking strictly construed in their favor, their liabilities never being extended beyond the letter of their contracts. Many decisions have been cited in support of defendant's contentions. A careful consideration of the authorities shows that they are sus-

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ceptible of classification. In some of them the principal received money contrary to the directions of a positive statute, as where a statute required that before a license should issue the fee therefor should first be paid into the hands of another officer, and the principal defendant issued the license without the fee being so paid, received the fee himself and misappropriated it, the sureties being held not liable. (*State v. Moore*, 56 Neb. 82, 76 N. W. 474; *Orton v. City of Lincoln*, 56 Ill. 79, 41 N. E. 159; *San Luis Obispo County v. Farnum*, 108 Cal. 562, 41 Pac. 445; *Lowe v. City of Guthrie*, 4 Okla. 287, 44 Pac. 198.) Other cases hold that where an officer receives money to which the State or municipality is not entitled, misappropriates it, and his sureties are sued that they are not liable. (*State v. Porter*, 69 Neb. 203, 95 N. W. 769; *People v. Cobb*, 10 Col. App. 478, 51 Pac. 523.) Sureties have been held not liable under the following circumstances: An officer collected money which the law directed should be paid to another. (*State v. Griffith*, 74 Ohio St. 80, 77 N. E. 686.) A public official committed a private trespass without warrant or authority. (*Drolesbaugh v. Hill*, 64 Ohio St. 257, 60 N. E. 202.) The law required a sheriff to take a replevy bond from the plaintiff before delivering property to him, and he delivered it without the bond, took cash as security, squandered the money, and it was held that he did not act by virtue of his office. (*People v. Hilton*, 36 Fed. 172.) A collector of customs, acting outside of his duties, undertook to transport a large sum of money from his office to a city in another State, and part of the money was stolen. (*United States v. Adams*, 24 Fed. 348.) A clerk issued guardian letters before a bond was first given as required by statute, the letters being void. (*Carpenter v. Sloane*, 20 Ohio 327.) A bond was conditioned that all public moneys that should come into the hands of an officer, should be faithfully accounted for, and he received money from the sale of private Indian lands and kept a small portion of the money for compensation. (*United States v. Rogers*, 81 Fed. 941.) The bond of

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a constable stipulated that he would "faithfully perform all of the duties of a constable in the service of all civil process which may be committed to him," and the alleged breach was that he had, after service of process, received from the defendant the money sued for and failed to pay it over. (*City of Boston v. Moore*, 3 Allen 126.) A marshal, without authority of law, named one to act as a special deputy at an election to perform the public duty of preserving the peace, and the one so named had committed a trespass; the sureties of the marshal held not liable. (*Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157.) A town trustee procured the allowance of his claim for services by the board, took a certificate therefor which he sold to the plaintiff, after which he procured a duplicate and settled with the board of trustees. (*State v. Keifer*, 120 Ind. 113.) A clerk made a certificate that the board of county commissioners had allowed a claim in his favor and assigned it to the plaintiff, then collected the claim; there was no law requiring or authorizing such certificate. (*Ottenstein v. Alpaugh*, 9 Neb. 237, 2 N. W. 219.) The bond of a city assessor was conditioned that he would perform his duties according to laws, ordinances and regulations "passed and approved by the mayor and common council;" he collected real estate taxes without any law, ordinance or regulation authorizing him to do so. (*City of San Jose v. Welch*, 65 Cal. 358, 4 Pac. 207.) The bond of a justice of the peace was conditioned that he would pay to the parties entitled thereto all such sums of money as should come to his hands by virtue of his office; he received money on void judgments. (*Barnes v. Whitaker*, 45 Wis. 204.) A county attorney collected money due upon seed notes to the State without authority. (*Wilson v. State*, 67 Kan. 44, 72 Pac. 517.) A careful study of these authorities shows that the official had, in each case, assumed to do something contrary to a positive law, or something without authority, acting outside of the line of his duty. The particular acts charged in each of those cases were

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held not to constitute breaches of the undertaking of the official, hence the sureties were correctly held to be not liable.

The important questions in the case at bar are:

Was the defendant Purdy acting by virtue of his office, and, by his conduct, and acts, shown in the complaint and agreed facts, faithfully performing, or failing to faithfully perform, his duties as a supervisor? To determine these questions we must look to the statutes prescribing the powers and duties of county supervisors, found in Act 39, Session Laws 1905. Chapter 4 of that act provides, *inter alia*: "Each County shall have the following powers * * *: To purchase and otherwise acquire, take on lease and hold real and personal property within its defined boundaries and to manage and dispose of the same as the interests of the inhabitants thereof may require; * * * to make contracts and do all things necessary and proper to carry into execution the foregoing powers and all other powers vested in said County or in any officer thereof." In chapter 14 of said Act it is provided: "The Board of Supervisors of each County shall have general supervision and control of all the public affairs of their respective Counties and the supervision of all subordinate officers, and, without prejudice to the generality of the foregoing powers, shall have the following specific powers: * * * To authorize and supervise the expenditure of all funds belonging to the County; * * * A majority of the members of the Board of Supervisors shall constitute a quorum for the transaction of business, but in order to pass any ordinance or to order the disposal of any property of the County, * * * it shall be necessary that such ordinance or order shall receive the approval of a majority of the members of the Board." It is seen that the general powers of the supervisors are exceedingly broad and the duties devolving upon them are numerous, embracing the conduct, control and supervision of all of the business affairs of the county, as well as the supervision of all subordinate officers, while the special power and duty of supervising all expenditures of the county is placed upon them.

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These statutory provisions are to be regarded as entering into the obligations of the official bonds in question, as parts of the contracts between the plaintiff and the defendants found in the bonds sued on. In the case of *Lowe v. Guthrie*, supra, cited and relied on by the defendant surety company, it is held that sureties on an official bond contract with reference to the law requiring such bond and regulating the duties of the officer, and that such laws enter into and become a part of the contract as much as if incorporated into the bond itself. In the same case the court, in stating the rule and exception thereto, differentiates between acts done by virtue of office and under color of office, saying: "When the principal exceeds his lawful authority and performs wholly unwarranted acts, unless such acts are done in an attempt to exercise his lawful authority, such acts are done *colore officii* and not *virtute officii*, and the principal alone is liable." It is stipulated that the defendant Purdy, in selling the crushed rock, in supervising the employment of labor, and in the preparation and approval of the pay-rolls for his district, was acting under a custom that prevailed in his county. Without any further showing, and nothing appearing to the contrary in the record, the presumption is that the board of supervisors and a majority of the members thereof, authorized him, as a member of the board, to do those things. Boards of Supervisors must of necessity appoint committees consisting of one or more from their body to look after matters of the county distant from the county seat where the board meets as a body. They may designate a third person as agent to perform an administrative act. The stipulated fact that in performing the acts alleged in the complaint the defendant Purdy was acting under a prevailing custom in his county, is sufficient, in the absence of a contrary showing, to authorize the presumption that the sale of the rock and his actions with reference to the pay-rolls were sanctioned by the board of supervisors, and that his acts were in the line of official duty. In *United States v. Adams*, supra, cited by the defendant, speaking of a similar

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situation, the court said: "But I think that an act done by the assistant, and within the authority and power of the department, must, until the contrary appears, be presumed to have been done under the direction of the Secretary of the Treasury." A faithful performance of his duty as a supervisor required that the defendant Purdy should see that the purchaser turned the money paid for the crushed rock into the county treasury or do so himself. Supervisors are provided for the purpose of conducting the business of the county and safeguarding its interests, not for the purpose of exploiting or looting the funds and property of the county. Each supervisor is an integral part of the board, a member thereof, and when he, acting for the board, makes a sale of county property and collects the purchase price, it is his duty to pay the same into the county treasury; and, if he does not do so, he is not faithfully performing his duties, as he and his surety have undertaken that he shall do, and a breach of the bond arises, and the obligation of the surety is found within the letter of the bond. The case at bar is similar in principle to that of the *City of Greenville v. Anderson*, 58 Ohio St. 463, where the condition of the bond was that the officer (city clerk) "shall faithfully perform the duties of his office," and among other duties enjoined upon him by law were those of examining claims allowed, notifying the officials charged with the duty of passing on claims when there was no fund out of which a given claim could be paid, and of drawing warrants for lawful claims. He violated these duties, drew warrants for claims not allowed, in other cases drew warrants for larger amounts than allowed and misapplied the overplus, and in other cases drew warrants for legal claims that had been allowed and fraudulently cashed the warrants, and he and his sureties were held liable on his bond. The court in that case, at pages 476, 477, said: "It will thus be seen that the law designed to make the office of city clerk a substantial safeguard against encroachments on the treasury of the city, and any misappropriation of the public moneys. No claim can

properly reach the treasury for payment except through the city clerk, and with his official sanction; and he is charged with the important duty of protecting the city from the payment, out of its public funds, of any but just and valid claims for whose payment the council has made the necessary appropriation and allowance. It is a palpable violation of his official trust to aid in the procurement of those funds in any other way, or for any other use. His sureties stand for his official integrity in this respect, and are liable for losses resulting from his official dishonesty. When, therefore, the defendant Elliott drew fraudulent warrants on the plaintiff's treasury for amounts greater than were due to the creditors in whose favor they were drawn, and greater than had been authorized by the council, obtained from the treasury the whole amount represented by the warrants, and appropriated the excess to his own use, he grossly misused his official position to perpetrate frauds on the city, whose loss so occasioned is within the obligation of his bond. It was manifest unfaithfulness to official duty, against the consequences of which the sureties undertook to indemnify the plaintiff. So, also were the fraudulent alterations of the claim ordinances passed by the council, thus falsifying the records which it was his duty to carefully and accurately keep and preserve, by inserting unauthorized claims, and thereafter drawing warrants therefor on the treasury, receiving the money on them, and converting it to his own use." The case at bar is unlike the case of *Superintendent of Public Works v. Richardson*, 18 Haw. 523, where a clerk, without any statutory or other authority, collected money due the government and squandered it, the court holding that he acted by color of office and not by virtue of office, and that there was no breach of his bond for which his sureties were liable. It was a duty resting upon the defendant Purdy, and each of his co-members of the board, to see that the money realized from the sale of the crushed rock was covered into the treasury, and this duty rested upon each of them by virtue of office. It was also a duty resting upon the

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defendant Purdy, by virtue of his office, when he undertook to supervise and approve the pay-rolls of persons in the employ of his county on road work in his district to see that names only of persons who actually worked were on those pay-rolls, and when he fraudulently placed names upon them of persons who did not work, approved the pay-rolls, and assisted in having the board of supervisors approve them, afterwards cashing warrants for such fraudulent claims, he was not safeguarding the property and interests of the county, and was not faithfully performing duties imposed upon him by law as a supervisor as the defendant surety had undertaken that he would do, and for the resultant injury to the county by reason of such acts, the defendant surety is liable under the terms of the bonds sued on.

County supervisors act in legislative and administrative capacities. In the enactment of ordinances they are exercising judgment, but in doing the acts complained of in this case, it is not a question of judgment, or of error of judgment, but failure to perform positive duties enjoined by law. The ultimate facts shown by the complaint and agreed statement of facts are sufficient to establish the failure of the defendant Purdy to perform positive duties resting upon him by virtue of his office. It neither requires logic nor extended argument to show that where an officer is acting in his official capacity and fails to perform a duty resting upon him, that he is not faithfully performing his duty.

That the board had determined to sell crushed rock in the Hamakua district, and authorized defendant Purdy as a committee of one to do so, is a reasonable inference from the stipulated facts. Power to sell carried with it power to receive the purchase money. The statutes containing no provision forbidding the purchaser to pay it to the board, or to a committee of the board, such collection was within the line of the duty of defendant Purdy. Having received the purchase money, it was his duty, by virtue of his office, to pay it into the county treasury. He was acting ministerially in making the sale and re-

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ceiving the purchase price, under general authority from the board; the board was acting by and through him. The question here is not the validity of the sale, but the liability of the sureties for the money received. The mere absence from the stipulation of the fact showing that an order of the board authorizing the sale had been made and recorded, is not sufficient to justify the conclusion that no such order was made. If such an order had been made, and this is indicated by the stipulation as to the custom, the sale was valid; if no such order had been made, the sale as between the county and the purchaser would not be good unless ratified. There is no showing, and no claim made, that the county did not regard the sale as valid, or that it sought to avoid it. On the other hand, the action of the county in suing for the purchase price might be regarded as a ratification. "A municipal corporation *may ratify* the unauthorized acts and contracts of its agents or officers, which are *within the scope of the corporate powers, but not otherwise*. Ratification may frequently be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals." (Dillon on Municipal Corp. 5 ed. sec. 797.) That in conducting the ordinary business of buying and selling personal property, which are ministerial acts, the board may act by its committee or by an agent, see the following authorities: *Holland v. State*, 23 Fla. 123, 1 So. 521; *Platter v. Elkhart County*, 103 Ind. 360, 2 N. E. 544; *Miller v. Dearborn County*, 66 Ind. 162; *Call v. Hamilton County*, 62 Ia. 448, 17 N. W. 667; *Wilhelm v. Cedar County*, 50 Ia. 254; *Cushman v. Carver County*, 19 Minn. 252; *Hanibal etc. R. Co. v. Marion County*, 36 Mo. 295; *Robert v. Kings County*, 38 N. Y. Supp. 521; *People v. Rensselaer County*, 5 N. Y. Supp. 600; *Duluth etc. R. Co. v. Douglas County*, 103 Wis. 75, 79 N. W. 34; *Cass County v. Gibson*, 107 Fed. 363; *Power v. May*, 114 Cal. 207; *Lassen County v. Shinn*, 88 Cal. 510; *Plummer v. Kennedy*, 72 Mich. 295; *Kramrath v. City of*

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Albany, 127 N. Y. 575; *Mayor of Baltimore v. Musgrave*, 48 Md. 272; *Hitchcock v. City of Galveston*, 96 U. S. 341; Dillon on Municipal Corp. 5 ed. sec. 775. "Boards of county commissioners, or, as they are called in some states, supervisors, are officers of a county charged with a variety of administrative and executive duties, but principally with the management of the financial affairs of the county, its police regulations, and its corporate business. Such boards have a perpetual existence, continued by members who succeed each other, and the body remains the same, notwithstanding a change in the individuals who compose it. A county board is usually considered to be a quasi-corporation. Its official duties and powers partake more of the characteristics of corporate acts and powers than those of mere trustees, and as a quasi-corporation it is governed by the fundamental rules which the common law has provided for the better government of corporate bodies, and for the proper exercise of the corporate functions." (11 Cyc. pp 380, 381.) It makes no difference whether it be held that in receiving the purchase price, and in padding the pay-rolls of road employes in his district, the defendant Purdy was acting by virtue of office, or by color of office, inasmuch as his failure to safeguard the interests of the county was a breach of the condition in his bond to faithfully perform his duties. This has been determined by the weight of authority, and especially by the supreme court of the United States, whose decisions are binding upon this court, in the case of *Lammon v. Feusier*, 111 U. S. 17, where the authorities are reviewed, and a marshal, who, under an execution directing him to seize the property of the execution debtor, seized the property of a stranger, and the court held that he acted officially, broke the condition of his bond that he would faithfully perform the duties of his office, and his sureties were held liable. See also *Lee v. Charmley*, 33 L. R. A. (N. S.) 275 and authorities cited in opinion and notes.

The case at bar is distinguishable from that of *People v. Pennock*, 60 N. Y. 421. In that case it was held that the stipu-

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lation of the sureties that the principal should account for and pay over all moneys that should come to his hands as supervisor, meant such as should come to his hands pursuant to law, and not such as the law required should be paid to another official. There the officer had no authority to receive the money. Here, as we have endeavored to show, defendant Purdy was acting within the line of his duty, under authority from the board, in a matter over which the law gave the board power to act; hence, this case is unlike the case of *People v. Pennock*. In the case of *National Bank of Redemption v. Rutledge*, 84 Fed. 400, an auditor charged with the duty of signing, sealing and issuing bonds that had been authorized by the county, fraudulently duplicated ditch bonds to the extent of \$10,000 which he negotiated, having no authority to issue the duplicates. The court held the sureties liable on the ground that in issuing bonds he was performing a duty devolved upon him by law; he was acting officially, and his wrongful act was a violation of his undertaking to faithfully perform the duties of his office. At page 7 of the additional brief filed by appellant, it is said: "Undoubtedly the Board of Supervisors could lawfully have empowered Purdy to perform any of the acts described in the plaintiff's declaration." Appellant then argues that the board did not grant such authority, and that if it had, Purdy would not have acted in the capacity of supervisor, but as the agent of the board. We agree with the statement that the board could have lawfully authorized Purdy to act in those matters, they being within the scope of the powers of the board. We have heretofore referred to the stipulation as to the custom under which Purdy acted, and the presumption growing out of same that he acted with the consent of the board and under its direction, and as a committee of the board performed ministerial acts, and was acting officially. "In passing judicially upon the records of county boards where authority appears or is implied by law, such records will be construed according to their intent and it will be assumed that the proceedings were rightfully had in

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the absence of all suggestion in the record to the contrary. It will be presumed that the members of such board as public officers have done their duty; that their meeting was properly convened and at the time designated by law; that they acted in accordance with rules adopted for the transaction of their business; and that a quorum of the board was present." (11 Cyc. 400, citing many authorities in notes.) As shown by the supreme court of the United States in the case of *Lammon v. Feusier*, supra, the decided weight of authority holds sureties on an official bond liable for wrongful acts committed by color of office, and all of the authorities hold them liable for wrongful acts committed by virtue of office. It therefore makes no difference whether the acts of defendant Purdy complained of were committed by virtue of office, or by color of office. They were acts of official misconduct, and constituted breaches of the first condition of the bonds sued on. It is palpable from the stipulated facts in this case that defendant Purdy performed the acts complained of by reason of being a supervisor and was enabled to perform them by reason of his official capacity, and in performing them claimed to act as a supervisor, and the parties dealing with him, dealt with him as such.

It is contended on behalf of the appellant that the judgment is not supported by the pleadings and the evidence. The theory upon which the declaration seems to have been drafted is that the money received by defendant Purdy was received by virtue of his office, although the acts charged are alleged to have been done by "virtue and color of his office" of supervisor, while acting and claiming to act as supervisor. If the declaration be defective, which it is not necessary to decide, the defects were cured by the appellant by stipulating the facts, and trying the case without objection to the sufficiency of the complaint, and by the judgment. The complaint did not allege the custom under which each supervisor acted in the matter of selling crushed rock and looking after the pay-rolls in the district from which he was elected. It is too late now to raise that question.

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"If evidence is admitted without objection to prove a fact imperfectly pleaded, the defect will be deemed waived, but no such result follows where the evidence is objected to when offered. In some cases this rule is held to apply only to the introduction of evidence to prove facts defectively alleged, but not wholly wanting, while other cases allow the proof of material facts which are entirely omitted from the pleading, to cure such omission, at least where the facts omitted go to the amount of the recovery merely and not to the right to recover, as where an allegation of earning capacity was omitted." (31 Cyc. 723.) In the case of *Nanie v. Namea*, 3 Haw. 628, the declaration was insufficient in that it did not allege title in the plaintiffs, but same could be implied from averments made; the court held the declaration to have been aided by the verdict and denied the motion in arrest of judgment.

It is contended on behalf of the county, appellee, that the defendant being a surety company must be regarded as an insurer, the contract strictly construed against it, and many authorities are cited to that effect. Suffice it to say that it does not appear in the record that the appellant, as surety, was paid any fee or fees for executing the said bonds, hence, it is unnecessary to pass upon the question.

The exceptions are overruled with costs to the appellee.

L. P. Scott, Deputy Attorney General (I. M. Stainback, Attorney General, with him on the brief) for plaintiff.

C. S. Carlsmith for defendant U. S. Fidelity & Guaranty Co.

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HATSUNOSUKE SAKATA v. Y. YOSHIKAWA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 12, 1914.

DECIDED NOVEMBER 4, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

SPECIFIC PERFORMANCE—*pleading—sufficiency of allegations as to agreement sought to be enforced.*

Where a bill of complaint alleges the drafting and delivery of a lease by respondent, as lessor, to complainant, as lessee, pursuant to prior negotiations had between the parties, a copy of said lease complete in all its terms being attached to the complaint and made a part thereof; the promise of lessor to execute such lease; the entering into possession by the lessee of the demised premises and his occupancy of the same for several months, during which time lessor neglected (without refusing) to execute such lease; the execution of the instrument by lessee; the acceptance of rent by lessor under the terms of said lease, and the making of permanent improvements on the demised premises by the lessee in reliance on the promise of lessor that he would execute the lease, held, that the complaint sufficiently alleges the agreement sought to be enforced, and the facts stated make a clear case of an offer to execute a lease, accepted and fully performed by complainant and partly performed by respondent.

OPINION OF THE COURT BY WATSON, J.

This is an appeal from a decree of a judge of the first circuit court, sitting at chambers in equity, sustaining a demurrer to complainant's third amended bill of complaint in a suit for the specific performance of a leasehold agreement and dismissing the suit. The demurrer was interposed upon several grounds, one of which was sustained, viz., that it nowhere appears, except inferentially, just what the oral agreement was the specific performance of which is sought in this suit. The bill, by paragraphs, avers: (I) jurisdictional facts as to the residence of the parties; (II) that prior to the eleventh day of February, 1913, complainant, as lessee, and respondent, as lessor, entered into negotiations for a leasehold agreement for

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a term of ten years, at a rental of \$30 a month, of certain premises on Emma street in the city and county of Honolulu; (III) that in pursuance of said negotiations the said lessor, respondent herein, had his attorney prepare a typewritten memorandum in duplicate of such leasehold agreement (so being negotiated), a copy whereof was presented by said lessor to lessee, complainant herein, on date of February 11, 1913; that at that time lessee paid to lessor the sum of \$30, rent for one month from date of February 1, 1913, for the payment of which amount the said lessor gave his receipt in writing (a copy of said so-called leasehold agreement, the same being an indenture of lease in due form, is attached to complainant's bill of complaint as an exhibit and by reference made a part of the complaint); (IV) that said memorandum of leasehold agreement so prepared by lessor's attorney and by said lessor presented to lessee fully and accurately set forth all the terms and conditions of said leasehold agreement, and the premises therein described are the premises pointed out by the lessor to the lessee as the premises upon which lessee was to enter; (V) that prior to the time when the lessor had his attorney prepare the aforesaid typewritten memorandum of leasehold agreement respondent had purchased lumber and had the same hauled to the premises described in said agreement and had employed a carpenter to tear away the old building in preparation for a new building and had already procured a building permit for a new building; that at the time of the negotiations for the leasehold agreement it was agreed between lessor and lessee that complainant should pay respondent the cost of this lumber and the hauling of the same and should pay the wages of the carpenter for tearing away the old building and should pay the cost of the building permit, and that complainant should erect the new building theretofore contemplated by respondent; that this agreement last aforesaid was no part of the leasehold agreement, nor were such payments to respondent and the construction of the new building to be a condition precedent to the execution by lessor of

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the leasehold agreement; (VI) that upon payment of the rent for the month of February, 1913, lessee forthwith entered upon the demised premises; that he paid to lessor the cost of the lumber and of the hauling of same and the cost of the labor of the carpenter for tearing away the old building, and the cost of the building permit, in the aggregate sum of \$227, and that, relying on the promise of lessor to execute the typewritten memorandum of leasehold agreement, lessee purchased other and additional building material and proceeded to erect and did erect one new cottage on the leased premises and did make repairs to the buildings theretofore standing upon the demised premises at an aggregate cost and reasonable value of \$794, which sum includes the \$227 paid by lessee to lessor as aforesaid; (VII) that complainant paid the rent as provided in said leasehold agreement, to wit, the sum of \$30 per month, and that lessor accepted and receipted for the same, up to and including the month of June, 1913; also that lessee paid the lessor the water rates, sewer rates, taxes and insurance for three years in advance in the aggregate sum of \$38.15; that after the month of June, 1913, and the payments by lessee to lessor as aforesaid, and after the completion of the improvements and the expenditure by lessee upon the demised premises lessor refused to accept further payments of rent and after said month of June, 1913, refused to execute said typewritten agreement and notified lessee to vacate the demised premises; that on August 8, 1913, lessor brought an action against lessee in the district court of Honolulu for summary possession of the demised premises, which action was dismissed at the instance of lessee because of insufficient notice to vacate, as required by statute; that thereafter, on November 19, 1913, lessor served on lessee a notice in writing to vacate, a copy of such notice being attached to complainant's bill as exhibit "B;" (VIII) that complainant has deposited in the court in this suit for the benefit of lessor all rents accruing subsequent to the month of June, 1913; (IX) that on February 11, 1913, the date of the delivery by lessor

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to lessee of the typewritten leasehold agreement, lessor promised to execute said instrument and gave as his excuse for not doing so on that day that he was too busy to go to the office of his attorney; that at the time of the subsequent payments of rent lessee requested the execution of said agreement but lessor again gave as his excuse that he was too busy but said he would execute the agreement; that lessee was in possession of the demised premises and that it was just as good as if he, lessor, had signed the lease; that complainant has executed and delivered to lessor a copy of said typewritten memorandum of said leasehold agreement; (X) that if lessor is not required to execute said leasehold agreement as prepared by his said attorney and if lessee is removed from possession of the demised premises he, lessee, will suffer great and irreparable injury; that he has no complete and adequate remedy at law and that lessor is not able to respond in money damages in an action at law; that lessee can have no other full and complete relief than by the performance of said leasehold agreement by lessor. The prayer of the bill is that the lessor may be ordered to execute said typewritten memorandum of leasehold agreement, and for general relief.

In considering this appeal it is only necessary for us to pass upon the one question whether the complaint sufficiently states the agreement sought to be enforced. We are of the opinion that it does. There is an allegation that on February 11, 1913, the respondent, pursuant to prior negotiations had with the complainant, had drafted by his attorney and in person delivered to complainant a leasehold agreement (lease) which he promised to execute. Complainant, upon the delivery of such draft, paid the rent reserved thereunder for the first month, took possession of the demised premises and made permanent improvements thereon "relying on the promise of the lessor that he would execute the leasehold agreement." The acts performed by complainant were exclusively referable to the contract. *Veeder v. Horstmann*, 83 N. Y. S. 102; *Cooley v. Lobdell*, 153 N. Y.

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596, 602; Browne, Statute of Frauds, §458. Complainant thereafter executed and delivered to respondent a copy of said agreement. It is alleged that complainant entered and held full possession of the premises until June following the delivery of the draft to him in February, paying rent therefor according to said agreement, but respondent neglected (without refusing) during that time to execute on his part the lease so tendered by him when lessee took possession, and at the expiration of five months respondent refused to execute such lease, refusing to accept further rent thereunder, and demanded that complainant vacate the premises. Respondent, when he delivered possession to the complainant, must be taken to have done so on the terms of the draft-agreement which had been delivered by him to complainant. There is, therefore, a sufficient allegation of the terms of the agreement. *Pain v. Coombs*, 1 DeG. & J. 34; *Wharton v. Stoutenburgh*, 35 N. J. E. 266; Taylor's Landlord & Tenant, p. 451. (A copy of the lease which it is alleged respondent agreed to execute is attached to the bill of complaint as an exhibit, and adopted as a part thereof. The terms of the contract are fully set out therein.) That it is proper thus to set out the contract *in haec verba*, see 20 Enc. Pl. & Pr. 441, note 4; *Joseph v. Holt*, 37 Cal. 250.

The allegations relating to the negotiations between the parties, as contained in paragraph II of the bill, may be treated as mere matter of inducement, and it may be assumed for the purpose of this case that up to the time of the drafting of the so-called leasehold agreement (lease) by lessor's attorney and its delivery by lessor to lessee that the negotiations between the parties were still in the treaty stage and no agreement concluded between them. The delivery of possession to the lessee, however, and the performance by him of the acts alleged in the complaint constituted an acceptance of lessor's offer, and an agreement was thereupon concluded between the parties which may be enforced in a court of equity. Pomeroy on Contracts, Secs. 64, 66, 67; *Seaman v. Aschermann*, 51 Wis. 678; also 3 L. R.

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A. N. S. 852, case note. While the allegations of the bill are disjointed and disconnected, and the facts relied on are not always made to appear sequentially, we are none the less of the opinion that the complaint sufficiently alleges the agreement which is sought to be enforced and that the facts stated make a clear case of an offer to execute a ten years' lease, accepted and fully performed by complainant and partly performed by respondent.

The decree appealed from is reversed and the case is remanded to the circuit judge for further proceedings.

W. J. Sheldon for complainant.

J. Lightfoot for respondent.

IN THE MATTER OF THE APPLICATION OF J.
LIGHTFOOT FOR A WRIT OF MANDAMUS
AGAINST DAVID KALAUOKALANI, JR., CLERK
OF THE CITY AND COUNTY OF HONOLULU,
TERRITORY OF HAWAII.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 27, 1914.

DECIDED NOVEMBER 4, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

STATUTES—primary election—construction.

The proviso to section 16, Act 151, S. L. 1913, in the following language, to wit, "Provided, however, that any candidate receiving the votes of a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate at such primary," construed to require a majority of the votes voted at such primary for all purposes, and not merely a majority of those voting for candidates for the particular office.

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SAME—*interpolation in statute.*

Statutory construction permits the implication of words apparently intended for the purpose of upholding and giving force to the legislative will, but does not authorize the interpolation of conditions into a statute—additional terms—not found in the statute considered as a whole.

OPINION OF THE COURT BY QUARLES, J.

At the primary election held on the 12th day of September, 1914, under the provisions of Act 151, S. L. 1913, John W. Cathcart and George A. Davis were candidates on the republican ticket, and the petitioner was a candidate on the democratic ticket, for the office of city and county attorney for the city and county of Honolulu. At said primary election there were cast for the various candidates for delegate to Congress in the city and county of Honolulu votes aggregating a total of 7,182. For the office of city and county attorney, the votes were: Cathcart, 3,575; Davis, 1,533, and petitioner, 1,769, making an aggregate of 6,877. Petitioner tendered the necessary fee to the respondent in order to have his name placed upon the official ballot for the election to be held November 3, 1914, which respondent declined to accept. The respondent has issued to said Cathcart a certificate of election at the said primary election to the said office of city and county attorney, and declared his intention to leave off of the official ballot the name of the petitioner as a candidate for city and county attorney for the approaching general election. The petitioner filed in the circuit court his petition for a writ of mandamus to compel the respondent city and county clerk, to print upon the official ballot for the said approaching general election, the name of petitioner as the democratic candidate for the office of city and county attorney for the city and county of Honolulu, and other relief. An alternative writ issued directing the said respondent to place the name of petitioner as the democratic candidate for said office upon the said ballot, or show cause why he should not do so. To the alternative writ the respondent

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made return stating in detail the facts as above stated, and praying that the alternative writ be discharged, and the peremptory writ sought be denied. The honorable circuit judge reserved the question "Shall the peremptory writ herein prayed for, issue?" to this court, for determination. There is no disagreement between the petition and the return as to the facts.

The reserved question requires a construction of the proviso to section 16 of said Act 151, S. L. 1913, with a view of determining, whether, in order to elect to the office, as contradistinguished from a nomination as a candidate for the particular office, it was necessary for the said Cathcart to receive a majority of all of the votes cast at the said primary of the city and county of Honolulu, or only a majority of the votes cast for that particular office. Section 16 of said act reads as follows: "The person receiving the greatest number of votes at a primary as a candidate of a party for an office shall be the candidate of the party at the following election, and any non-partisan candidate receiving at least twenty (20) per cent. of the votes of registered voters cast at such primary shall also be a candidate at the following election. Provided, however, that any candidate receiving the votes of a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate at such primary." The act provides a scheme for the selection of candidates for the various political parties, and non-partisan candidates, for the next general election to follow, and all of the provisions of the act relate to the selection of such candidates, and not to the election of candidates to office, with the exception of said proviso, a fact important to be kept in mind in determining what the legislature meant when it provided that, "any candidate receiving the votes of a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate at such primary." The query arises: What did the legislature mean by the words "a majority of the

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registered voters voting of the district?" We are assisted to the natural answer by the last three words of the proviso, "at such primary," found in the same sentence. There is no doubt as to what voters were to be considered. The statute fixes that beyond question by saying "the registered voters voting of the district." In other words, voters who had registered but did not vote at the primary are not to be considered, but only those who voted. Those who voted where, and when? The answer to this is found in the last three words of the proviso, to wit, "at such primary." This is the obvious intent of the words used. If the legislature had intended that a vote less than a majority of all of the registered voters who vote at the primary, as, for instance, a majority of those who vote for the particular office, should elect, it would doubtless have said so, which would have been a very simple matter. But failing to say that, and having provided that a candidate receiving "a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate at such primary," it was thereby intended that the majority required was that of the entire number of voters voting at the primary, and not a majority of those voting for any particular office. This conclusion is strengthened by the language of the sentence in the same section immediately preceding the proviso, wherein it is provided that a "*non-partisan candidate receiving at least twenty (20) per cent. of the votes of registered voters cast at such primary shall also be a candidate at the following election.*" Throughout the entire act only one primary is provided for to be held on the second Saturday of September, 1914, and thereafter biennially, in the city and county of Honolulu, the time being fixed in section 3 of the act, and the same section also providing that "No person shall be a candidate for the ensuing general or county election unless he shall have been nominated at the primary next prior thereto." The act provides the manner of conducting the primary and the form of ballot, the names of the candidates of all parties, and non-parti-

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san candidates, for all of the different offices, to be printed on the ballot for the primary. At the oral argument counsel for one party gave a splendid illustration, in the form of a hypothetical case: A primary is held in a county at which three thousand votes are cast. One thousand vote for the nomination of candidates for county clerk, but do not vote for the nomination of candidates for any other office. One thousand vote for the nomination of candidates for sheriff, but do not vote for the nomination of candidates for any other office. And the remaining thousand vote for the nomination of candidates for the office of county attorney, but do not vote for the nomination of candidates for any other office. A candidate for the last named position receives five hundred and one votes, a bare majority of the votes cast for nomination to the office for which he is seeking the nomination. Has he received the nomination as a candidate for his party at the ensuing election, or has he been elected to the office, thus dispensing with the general election to follow so far as this particular office is concerned? According to the contention of the petitioner he has been nominated as his party candidate, but has not been elected. According to the contention of the respondent he has been elected to office, and not nominated, as a candidate for the office, although he has only received one-sixth of the votes cast plus one. There is nothing in the language of the statute which indicates an intention on the part of the legislature in the said proviso that a minority of the voters who vote at the primary shall be sufficient to elect a candidate to office. To so construe it would be to add to the terms of the statute, which this court is not authorized to do. Statutory construction permits the implication of words apparently intended for the purpose of upholding and giving force to the legislative will, but does not authorize the interpolation of conditions into a statute—additional terms—not found in the statute considered as a whole. We are therefore constrained to conclude that what was intended by the language used in said proviso in regard to the majority vote necessary to elect one

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who is seeking a nomination as a candidate for an office, to the office, at the primary, is a majority of all of the voters voting at the primary for any purpose, and not merely a majority of those voting for the nomination of candidates for the particular office for which he seeks a nomination. It must also be kept in mind that by the provisions of said section 16 the vote required to nominate a candidate for a particular office is the highest vote cast for any candidate of his party for that particular office, which may be a very small minority. The object and purpose of the statute is the selection of candidates to represent the different political parties, and non-partisan candidates, at the next ensuing general election, and to place the power to do so directly in the hands of electors. The idea of electing any one to an office at such primary is apparently an afterthought, interjected into the act in the form of the said proviso; and, taking the language of the act as a whole, the reasonable presumption is, that the legislature came to the conclusion that if a candidate for the nomination of any party, or for nomination as a non-partisan candidate, for any certain office, was so popular that he should receive a majority of all of the votes cast at the primary in the district in which he is a candidate, that the people having expressed such decided preference for this particular candidate, that it would be unnecessary to again test the will of the voters in that regard. But the language used shows that the legislature intended that in order to elect a particular candidate for a certain office at such primary, and therefore dispense with the general election so far as such office is concerned, that the candidate should be the choice of a majority of all the registered voters voting at the primary.

Many authorities have been cited from various States upon the question under consideration. None of the decisions are exactly in point, in that in none of them is the language of the constitution or statute under which the election was held identical with the language used in our statute. A number are cited to the effect that where the creation of a county, or school, or the

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imposition of a tax, or incurring a public indebtedness, or amending a constitution, or calling a constitutional convention, is submitted to the voters with the requirement that it shall be assented to or acquiesced in by a majority of the voters of the State, county or district in which submitted, that a majority of those voting upon such question, though not a majority of the entire vote, if in favor of the proposition submitted, is sufficient to carry it; and that those who fail to vote upon the question are presumed to have assented to the proposition. Of this class of cases that of *County of Cass v. Johnston*, 95 U. S. 360, is a fair sample. In that case a special election was held for the purpose of voting on the question of giving township aid to a railroad. Under a provision in the state constitution, such aid could not be extended "unless two-thirds of the qualified voters * * * at a regular or special election to be held therein, shall assent thereto." The court held that those who did not vote *assented* to the expressed will of the majority who did vote, that vote being in the affirmative. So in *Green v. State Board of Canvassers*, 5 Idaho 130, where the question of ratifying an amendment to the state constitution was submitted to the voters, the provision was, "if the majority of the electors shall ratify the same." In some cases the requirement was that a majority, or two-thirds of the electors "voting thereon" assent or vote in the affirmative. It seems plain that when the provision requires a certain per cent. of the voters voting thereat, that it means at the election. It seems equally clear that when the requirement as to the necessary vote is "a majority voting thereon," it means those who vote on the particular question, and not on other questions, and that this class of cases is not in point here. In our opinion, the language used in the proviso to section 16 of the act under consideration is equivalent to a provision that the necessary vote is "a majority of the voters voting at the election." In this class of cases the weight of authority, and the better reasoning are to the effect that the majority required is that of the voters voting at the election on any and all questions, and

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not merely a majority of those voting for a particular candidate or a particular question. The rule in such case is tersely stated in 15 Cyc. page 390, where it is said: "But according to the weight of authority, when a question is referred to a vote of the people, to be decided by a majority of the legal voters at a general election, the requirement calls for the requisite majority of those who vote on any ticket, nomination, or question at that election, and not merely of those who vote on the particular question presented." Cases where the requirement was that the question should receive a majority of the voters voting "thereon" clearly mean on the particular question. Such cases are not in point here. In *City of Santa Rosa v. Bower*, 142 Cal. 299, the court, speaking of the provision that a majority voting thereat should be necessary said. "The case of *People v. Town of Berkeley*, 102 Cal. 298, involved a statutory provision substantially the same as the constitutional provision in question in the case at bar. That case construed the provision of section 6 of the same article of the constitution, providing that cities and towns heretofore organized or incorporated may become organized under the general laws 'when a majority of the electors voting at a general election shall so determine,' and it was held to require the favorable vote of a majority of all the electors who voted at the election. There is no substantial distinction between the phrase construed in that case and the one under consideration here. A majority of the electors 'voting at a general election' is substantially the same thing as a majority of the qualified electors 'voting thereat.' The word 'thereat' in section 8 by grammatical construction refers to the previous phrase 'general or special election,' and is exactly the same in meaning as if the sentence had read 'if a majority of the qualified electors voting at such election shall ratify the same.'" The text quoted from Cyc. is supported by the following authorities: *High School v. Commissioners*, 61 Kan. 796; *People v. Town of Berkeley*, 102 Cal. 298; *City of Santa Rosa v. Bower*, supra; *State ex rel Greene v. Hugo*, 84 Minn. 81; *State v. Babcock*,

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17 Neb. 188; *State v. Sutterfield*, 54 Mo. 391; *State v. Mayor of St. Louis*, 73 Mo. 435; *People v. Brown*, 11 Ill. 478; *People v. Wiant*, 48 Ill. 263; *Chestnutwood v. Hood*, 68 Ill. 132; *Enyart v. Hanover Township*, 25 Ohio St. 618; *State v. Foraker*, 46 Ohio St. 677; *State v. Bechel*, 22 Neb. 158; *City of South Bend v. Lewis*, 138 Ind. 536; *In re Davis*, 62 Kan. 231, and others unnecessary to cite.

In *State v. Bechel*, supra, the proposition of permitting a street railway to build its lines upon the streets of the city of Omaha was submitted to the voters at a general election. The proposition received a majority of those who voted upon it, but not the required majority of the voters voting at the election. The court in its decision says relative to this point: "Section five * * * Compiled Statutes provides * * * 'and if a majority of the votes cast at *such election* shall be in favor of the constructing and operating of such proposed street railroad' the council shall cause the clerk to make the certificate, etc. It is impossible for us, by any system of logical reasoning, to say that the election held in the city of Omaha on the 3d day of May, 1887, was other than one election. There were but the usual number of judges and clerks, but one poll list, and in some precincts but one return. If we say there were two elections, to-wit: the general city election, and the election upon the proposition submitted, to which of these can we say that the poll list, or list of voters actually voting belonged? Most certainly to the general election. If that is true, to what record can we apply for a list of those who voted at the other election, *i. e.*, the one in which votes were cast on the proposition? How could that election be contested upon the ground that illegal votes were cast by those who were not electors? Obviously it could not be successfully done. How can it be said that the fact that another ballot box was prepared, into which ballots were deposited to be counted as cast upon the proposition in question, would produce a different legal result than if the proposition had been written or printed on the tickets for the general elec-

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tion, and only 1,650 of the voters had voted upon the question. We confess our inability to divide or separate the election of the day named, and must hold that it constituted but one election. That being the case, 'a majority of the votes cast at such election' were not 'in favor of the constructing and operating such proposed street railroad' as required by the law of the state, and the consent of the majority of the electors was not given."

In the case at bar there was no proposition submitted similar in nature to the proposition submitted in the large majority of the cases. Here the question was as to the selection of political candidates for the several parties, and there is less reason for saying that there was more than one election than in the case of *State v. Bechel*, and as much reason for saying that there was only one election, only one set of election officers, only one poll list, and that the majority required in order to elect Mr. Cathcart was a majority of all of "the registered voters voting of the district in which he is a candidate," that is, in the city and county of Honolulu, at said primary, upon all questions, was necessary in order to elect him to the office of city and county attorney.

The difficulty of ascertaining the number of registered voters voting at the primary election aforesaid has been suggested. Section 12 of the act provides that the county clerk shall, at least three days prior to the primary election, present to the judges (inspectors) of election lists of the registered voters. Section 23 provides that "the laws relating to elections shall apply to all primaries" so far as consistent with the provisions of the act. Sections 61 and 98 of the Revised Laws provide that the inspectors of election shall check upon the list of registered voters furnished them, all who vote, and make a list of all who vote, and send such list with other named matters in a sealed packet to the secretary of the Territory addressed to him, and which packet may be opened and inspected in the presence of a justice of the supreme court, after which it shall be resealed in the presence of such justice. It is thus seen that the law provides a way in

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which, should a dispute arise as to the number of voters voting at a primary election, that number can be correctly ascertained. The poll list of voters furnished under the provisions of our election laws, is the best evidence of the number of voters who voted. (*High School v. Commissioners*, supra.)

A query as to whether the proviso to section 16 of the primary law is germane to the scope of the act as shown by the title and body of the act has been suggested. That question has not been considered, and is not decided. Mr. Cathcart having received a vote less than a majority of the registered voters voting at the primary in the city and county of Honolulu, was not elected under the terms of the proviso. For the reasons herein given the question reserved by the second judge of the first circuit is answered in the affirmative.

J. McCarn for petitioner.

F. W. Milverton (*Thompson, Wilder, Milverton & Lymer* on the brief) for respondent.

F. E. DAVIS & COMPANY, LIMITED, PLAINTIFF
AND PLAINTIFF IN ERROR, *v.* ILLINOIS-PA-
CIFIC GLASS COMPANY, A CORPORATION, DE-
FENDANT AND DEFENDANT IN ERROR, AND
HONOLULU BREWING AND MALTING COM-
PANY, LIMITED, A CORPORATION, ET AL., GAR-
NISHEES.

MOTION TO DISMISS.

ARGUED OCTOBER 19, 1914.

DECIDED NOVEMBER 14, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*costs—security for.*

A writ of error does not lie to an order of a circuit judge at chambers requiring security for costs in a term case then pending in the circuit court and staying proceedings in the principal action pending a compliance with such order.

Davis & Co. v. Illinois-Pacific Glass Co., 22 Haw. 303.

OPINION OF THE COURT BY WATSON, J.

Assumpsit in the circuit court of the first circuit brought by the plaintiff in error against the defendant in error. Subsequently the defendant moved for and obtained from the circuit judge at chambers an order requiring the plaintiff to give security for costs of court to accrue in said cause to the final determination thereof, and that all further proceedings be stayed until said bond and security have been given. From that order this writ of error is prosecuted. The defendant moves to dismiss the writ of error for the reason, among others, that no final judgment has been entered in the above entitled cause and the order complained of is not such a final order as may be reviewed on writ of error. Authority to require security for costs is to be found in section 1648 of the Revised Laws, as follows: "Sec. 1648. Circuit judges at chambers. The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts, according to law, as follows: * * * Tenth. To require either the plaintiff or defendant, upon the application of the opposite party, to give security for costs in any civil cause, upon such terms and conditions as the judge shall deem just." There is no contention that the circuit judge at chambers was without jurisdiction to make the order, in which event, under the authority of *Territory v. Cotton Bros.*, 17 Haw. 374, the order might be deemed a final one for the purpose of review by writ of error. Indeed, it is impliedly conceded that such jurisdiction existed, as counsel for plaintiff, in opposition to the motion to dismiss, argues that the order requiring plaintiff to give security for costs and staying proceedings pending the compliance with the order was an ancillary or interlocutory proceeding before the circuit judge at chambers and that such order is a final determination of such ancillary or collateral proceeding, to review which a writ of error will lie.

We agree with so much of plaintiff's contention as relates to the nature of the proceeding, that is, that it was ancillary or

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incidental to the principal action,—the term case then pending in the circuit court. *Western Nat. Bank v. Peacock*, 18 Haw. 161; *Volcano Stables & Transportation Co. v. Ferry*, ante p. 229. It is well settled in this jurisdiction that the term “writ of error,” as used in our statute authorizing the suing out of same (R. L. Sec. 1869), is to be taken in its common law acceptance and that final judgment must have been entered in the cause before the writ will lie. *Territory v. Cotton Bros.*, supra; *Kaehu v. Namealoha*, 20 Haw. 516. Was the order of the circuit judge requiring plaintiff to furnish security for costs and staying proceedings in the cause pending a compliance with the order final? We think not. It was merely interlocutory. It did not determine the controversy between the parties. There remain questions of fact unsettled. *Gear v. Henry*, 21 Haw. 55. “No judgment is final which does not terminate the litigation between the parties to the suit.” *St. Clair Co. v. Lovington*, 18 Wall. 628. The cases cited by counsel for plaintiff on the point that a final decree, to be appealable, need not decide all the issues, but may only be a final determination of a collateral matter, are not in point, and no other cases are drawn to our attention wherein a writ of error has been sustained to review other than a final judgment, this being the common law rule and the rule that obtains in this jurisdiction. The order complained of makes no final disposition of the case in the court below. Under its terms the action is neither dismissed nor finally stayed. The court below may rescind its order at any time. It is only upon the idea that the whole matter is disposed of and ended in the court below that the writ of error can be sustained. *Peet v. McGraw*, 21 Wend. 667. In the case of *Livingston v. Dorgenois*, 7 Cranch 577, where the court below had ordered that proceedings be finally stayed, the supreme court of the United States said (p. 589), “It is objected that a writ of error does not lie in such a case. It may be admitted that at common law this is not such a judgment as will support a writ of error * * * but it is said not to be a

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final sentence because the court below may rescind it at any time. A decree that a judgment shall be finally stayed is a final decree as much as a decree dismissing the bill." The court there held that a writ of error would not lie, but owing to the peculiar circumstances of the case, the writ of error having been dismissed, other relief was awarded. An order requiring security for costs is not such a final order or judgment as may be reviewed on writ of error. *Gesford v. Critzer*, 7 Ill. (2 Gilman) 698, 699. See also *Selby v. Hutchinson*, 9 Ill. (4 Gilman) 318, 319; *Knight v. Fisher*, 15 Colo. 176.

We are of the opinion that the order requiring security for costs and staying proceedings pending compliance therewith was interlocutory and we accordingly hold that such an order cannot be brought here immediately by writ of error. It is unnecessary for us to pass upon the question whether it could be brought here immediately on exceptions. "The statute in regard to exceptions is broader than that in regard to error." *Territory v. Cotton Bros.*, *supra*, 379.

The motion to quash or dismiss is granted and the writ is accordingly quashed.

E. C. Peters for plaintiff in error.

A. L. Castle (*Castle & Withington* on the brief) for defendant in error.

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TERRITORY OF HAWAII v. J. A. KUA.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED NOVEMBER 9, 1914.

DECIDED NOVEMBER 21, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CONSTITUTIONAL LAW—*statutes—title.*

Section 45 of the Organic Act which provides "That each law shall embrace but one subject, which shall be expressed in its title," has the force and effect of a constitutional provision which is mandatory.

STATUTES—*title of amendatory act.*

Where the title to an act amending a certain section of a certain chapter of the Revised Laws expresses one branch or phase of the subject treated in such chapter, the amendatory act is thereby restricted; and, a proviso therein relating to a subject separate and distinct from that expressed in its title, is void.

SAME—*misleading title.*

The title to Act 99, Laws 1913, reads: "An Act to Amend Section 1323 of the Revised Laws as Amended by Act 151 of the Laws of 1909, Relating to the Issuance of Licenses;" the body of the act contains a proviso relating to the payment of personal and property taxes. Held, that the said title is misleading in so far as the matter contained in said proviso is concerned, the same not being related to, nor allied with, the subject expressed in the title.

OPINION OF THE COURT BY QUARLES, J.

(Robertson, C. J., dissenting.)

The defendant was convicted in the district court of Honolulu upon the charge of driving a hack without first obtaining a license as required by section 1418, R. L., fined \$3, and appealed to this court upon points of law which are fully set forth and stated in the notice and certificate of appeal. The points of law relied on, so far as the statute under consideration is affected by the Fifth and Fourteenth Amendments to the Federal Constitution, were considered and determined in the case of *In re Kalana*, ante p. 96, for which reason it is unnecessary to

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discuss them here. In the *Kalana* case we held the last proviso of Act 99, S. L. 1913, amending section 1323, R. L., not invalid by reason of any of the objections there urged against it. In the case at bar other objections are made against the validity of the proviso, which we summarize and arrange as follows, to wit: (1) The subject covered by the said proviso is separate and distinct from the subject covered by the title and object of the act; (2) The said proviso as an enactment "is oppressive and unreasonable;" (3) The said proviso is void for the reason that it confers judicial powers upon the tax assessor and collector in that he is under it the judge of the amount of taxes due, especially, as in the case at bar, where there is a dispute between him and the taxpayer as to the amount of taxes due.

Is the act in question violative of section 45 of the Organic Act? Said Act 99, S. L. 1913, is as follows: "An Act to Amend Section 1323 of the Revised Laws as Amended by Act 151 of the Laws of 1909, Relating to the Issuance of Licenses. Be it Enacted by the Legislature of the Territory of Hawaii: Section 1. Section 1323 of the Revised Laws, as amended by Act 151 of the Laws of 1909, is hereby further amended so as to read as follows: 'Section 1323. Signed by whom. Every license shall be signed by the Treasurer of the County or City and County, within which the license is to be operative, and impressed with the seal of his office. Such seal shall be as determined by the Board of Supervisors. Provided, that any license which authorizes the licensee to do business throughout the Territory shall be signed by the Treasurer of the County or City and County in which the principal office of the licensee is situated; and provided further, that no license shall be so issued until the applicant therefor shall have filed with the Treasurer of the County or City and County a certificate showing the payment in full of all taxes due from said applicant on the date of said application.' " Section 45 of the Organic Act is as follows: "Sec. 45. That each law shall embrace but one subject, which shall be expressed in its title." This provision,

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which has the force and effect of a constitutional requirement, is similar to that found in various state constitutions and is universally held to be mandatory by the state courts, with the exception of those of California and Ohio. A similar provision was found in the constitution of Hawaii under the Monarchy, the word "object" being used instead of "subject," and was held to be mandatory in the case of *Marchant v. Marchant*, 3 Haw. 661, where the court said of it: "The Court regards this provision of the Constitution as mandatory, and the disregarding of it by the Legislature renders any of these enactments in which it may be disregarded, nugatory." The identical provision under consideration was contained in the constitution of the Republic of Hawaii in article 63. To determine the question now being considered we must search in the title and object of the statute for the subject thereof. In its title we find that it is to amend section 1323, R. L., "Relating to the Issuance of Licenses." The subject upon which the legislature proposed to legislate was, as expressed in the title, a matter relating "to the Issuance of Licenses," and, as shown by the sub-title, head note and catch words, "Signed by whom," related not to the substance of the license, but to the particular person or officer who should sign the same. There is nothing in the object of the act, down to and including the first proviso, which relates to anything other than the person or officer who shall sign licenses. It is a well established rule that the title of an act, under the constitutional requirement aforesaid, may be broader than the act without violating such constitutional requirement. It is an equally well settled rule that the title, if restricted, must be the standard to determine the scope of the act, and that the act cannot be broader than its title. In other words, the title fixes the bounds of the act, beyond which the legislature may not go. "If a restrictive title is chosen the act must be kept within it." (1 Lewis' Southerland, Stat. Const., Sec. 117.) Section 1323, R. L., before and after its amendment, was and is a part of chapter 102 of the Revised Laws relating to "Licenses." We

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note the history of this particular statute (now section 1323, R. L.) as follows: By act of June, 1888, all licenses issued were to be signed by the "Minister of the Interior or the Chief Clerk of the Interior Department," which was continued under the Republic (P. L., Sec. 847), and under the territorial regime (Sec. 1323, R. L.). It was amended by Act 151, S. L. 1909, to read as follows: "Section 1323. Signed by whom. Every license shall be signed by the Treasurer of the County within which the license is issued to be operative and impressed with the seal of his office. Such seal shall be as determined by the Board of Supervisors. Provided, that any license which authorizes the licensee to do business throughout the Territory shall be signed by the Treasurer of the County in which the principal office of the licensee is situated." This statute was continued in this form until amended by Act 99, S. L. 1913, hereinbefore quoted. It will thus be seen that the amendment of section 1323, R. L., made by said Act 99, S. L. 1913, consisted in providing that licenses shall be issued by the treasurer of the county or city and county, and in adding the last proviso requiring the certificate showing the payment of all taxes due to date from the applicant. Was this last proviso germane to section 1323, R. L., or to the subject of "Issuance of Licenses"? The chapter (102) in which section 1323 is found appears to have been enacted as police measures to protect the public against extortion and to restrain or control those engaged in the various occupations licensed, hence must be regarded as police regulations and not revenue measures. This court, speaking through Mr. Justice Watson in the *Kalana* case, *supra*, shows that the statute, or rather the sections of chapter 102, R. L., relating to drivers of vehicles, were enacted in the exercise of the police power, while the amendment in the shape of the last proviso—the one under consideration—can only be regarded as an exercise of the power of taxation as contradistinguished from the police power. What natural or logical connection has the collection of taxes that are past due with the

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issuance of licenses or the police control of the several occupations licensed, or with the personnel of the particular officer who shall sign the license when it issues? It is apparent that this last proviso, a measure for the collection of taxes past due, in itself a furtherance of the power of taxation, was engrafted into and made a part of a purely police measure. The two powers are separate and distinct. The two subjects,—that of licensing occupations for police purposes, and that of taxation, are also separate and distinct. It is true that a statute may be enacted which is in the exercise of both the police and taxing powers, but it must relate to but one subject and that subject must be expressed in the title of the statute.

Is not the collection of taxes, at which the amendment or proviso under consideration was directed, a subject-matter separate and distinct from the regulation of occupations by license under the police power? How is the efficiency and competency of a hack-driver affected either one way or the other by the fact of his having paid or not having paid taxes assessed against him in the past? Are the lives and limbs of those who ride in the hack driven by him any safer by his having paid all the taxes which he owes to the government? If so, then it would be just as logical and just as reasonable to say that the lives and limbs of passengers are safer in a hack driven by a driver who has paid his private debts than they would be in a hack driven by a driver who has not paid such private debts. It seems palpable that the payment of a debt, whether it be a public one in the shape of a tax assessed, or a private one made by contract, is a subject-matter separate and distinct from the regulation of an occupation or the issuance or signing of a license issued in furtherance of the exercise of the police power of the government. If this be true the last proviso to Act 99, S. L. 1913, requiring the payment of all taxes as a prerequisite to procuring a license to drive a hack or to carry on any of the occupations licensed by chapter 102, R. L., as amended, is not germane to the title or object of said act, but is an independent

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matter or subject interpolated therein for the purpose of assisting the government in the collection of taxes due it, and the said last proviso violates section 45 of the Organic Act, and is void.

In our opinion, the payment of taxes, whether delinquent or not, is a subject separate and distinct from the issuance of occupation licenses. The legislature here has sought to make such payment a condition precedent to the issuance of a license, and therefore there is some ground for contending that it is germane to the subject expressed in the title to Act 99, S. L. 1913. But under the guise of exercising one power—the regulation of occupations by license—may the legislature impose the condition of performing an act separate and distinct from the conduct of any occupation, as it has attempted here? If so, the evils intended to be avoided by section 45 of the Organic Act may not be avoided and such provision is impotent and the legislature may do, by indirection, that which the Organic Act directs it shall not do.

In the case of *Dolëse v. Pierce*, 124 Ill. 140, it was held that an act purporting to amend certain sections of a former act must be restricted to the subject covered by such former sections, the court, on pages 146, 147, saying, *inter alia*, as follows:

“ * * * The act of 1874, as appears from its title, extends to a revision of the entire law then existing, relating to township organization, while that of the act of 1887 is expressly limited to the amendment of certain specified sections of the law as revised by the former act. This being so, it is clear that the scope of the act of 1887 is limited by the subject matter contained in the amended sections before amendment, for to introduce any new substantive matter not germane or pertinent to that contained in the original sections, could, in no proper sense, be regarded as an amendment of them, but would manifestly be additional, independent legislation upon a matter not embraced in the title of the act, and consequently void.

“The amendment of an act in general or of a particular section of an act, *ex vi termini*, implies merely a change of its pro-

visions upon the same subject to which the act or section relates. These propositions are so elementary in their character as to require neither argument nor citation of authority in their support. * * *

"It is said, however, that legislation affecting the boundaries of cities and villages is germane to that affecting the boundaries of townships. But counsel have failed to tell us in what way or sense the one is germane to the other, or what meaning they attach to that term in giving a construction to the provision of the constitution in question. Literally, 'germane' means 'akin,' 'closely allied.' It is only applicable to persons who are united to each other by the common tie of blood or marriage. When applied to inanimate things, it is, of course, used in a metaphorical sense, but still the idea of a common tie is always present. Thus, when properly applied to a legislative provision, the common tie is found in the tendency of the provision to promote the object and purpose of the act to which it belongs. Any provision not having this tendency, which introduces new subject matter into the act, is clearly obnoxious to the constitutional provision in question."

There is no close alliance between the payment of a property tax and the license and regulation of an occupation. The one is a police measure, while the other is a revenue measure, as is clearly shown in the *Kalana* case, *supra*. The original section, amended by Act 99, S. L. 1913, related solely to the subject concerning what particular officer should issue an occupation license. That is the subject to which the amendment must be restricted. The addition of the proviso requiring the payment of all taxes due from the applicant for the license is a new and independent matter, disconnected from the question as to who shall issue the license, and, therefore, is not germane to the subject of the act. The payment of personal and property taxes is a subject independent and disconnected from any of the sections of chapter 102 of the Revised Laws. The only matter added to section 1323, R. L., by Act 99 S. L., 1913, is that relating to the duties of the treasurer of the county or city and county, other than said last proviso. If the title had read, "An

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Act to amend Chapter 102 of the Revised Laws, relating to Licenses," the question would be entirely different. The title of Act 99, S. L. 1913, is not as broad as that of chapter 102, R. L., which is "Licenses," but is restricted to the "Issuance of Licenses."

But, as we have pointed out, the original section, both before it was compiled into the Penal Laws, and since, with the various amendments, heretofore related only to the personnel of the officer signing the license, and so long as it did so it was clearly embraced within the subject expressed in the title to Act 99, S. L. 1913.

The rule enunciated in *Dolese v. Pierce*, supra, was approved in the following cases: *Village of Hyde Park v. City of Chicago*, 124 Ill. 156; *Donnersberger v. Prendergast*, 128 Ill. 229; *McGurn v. Board of Education*, 133 Ill. 122; *City of East St. Louis v. Rhein*, 139 Ill. 116.

The rule explicitly laid down in the case of *Dolese v. Pierce*, supra, is recognized in *Hyman v. Kapena*, 7 Haw. 76. The statute there involved was an act amending the act of 1878, entitled, "An Act to Amend an Act entitled 'An Act to Increase the Import Duties upon Certain Goods, approved the 27th day of September, 1886,'" the title of the amendatory act reading, "An Act amendatory of Chapter XXVIII. of the Session Laws of 1878, relating to import duties upon wines." In the body of said amendatory act the legislature assumed to increase the duties upon cigars, cheroots, and articles other than wine. The act was held unconstitutional in so far as the act related to the import duties on all goods other than wines, the court saying:

"Article 77 of the Constitution reads: 'To avoid improper influences which may result from intermixing in one and the same Act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.' A like article is found in the constitution of a majority of the States of the American Union, some of them using the term *one subject*, and some *one object*. The purpose of this provision is, first, to prevent *hodge-podge* or *log-rolling*

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legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles give no intimation; and third, to apprise the people of proposed matters of legislation. See Cooley's Const. Limitations, p. 143.

"It is clear that the title in the present case is misleading, and would frustrate the second or third objects above proposed. It is declared by this title that the law intended to be amended is one relating to import duties upon wines, and inferentially upon wines only. When the Act is read by its title, this matter is what is presented to the attention of the Legislature. Without the words 'relating to import duties upon wines,' the title describes an Act amending a specified Act of 1878, whatever subjects may be included in it; but these words being added must be considered to restrict the scope of the Act and of the amendment. Says Cooley, at page 149 of the work cited above: 'The Courts cannot enlarge the scope of the title; they are vested with no dispensing power; the Constitution has made the title the conclusive index as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if in fact the Legislature have not seen fit to make it so.'

"The error in this title is not in its insufficiency. As an amendatory Act, it might be considered sufficient if it only referred to an original Act having a title properly describing the subject matter. See *State vs. Ranson*, 73 Mo., 78, referred to at page 153 U. S. Digest, New Series, Vol. 13. In the case before us the title goes beyond such reference, and wrongly describes the Act referred to and the matter amended.

"The Act being broader than the title does not, however, render the Act unconstitutional as to the subject expressed in the title, when that is separable from matters which are extra the title. Cooley's Const. Lim., page 148; *Re Metropolitan Gaslight Co.*, 85 N. Y. 526; *Dewhurst vs. Allegheny City*, 95 Pa. St., 437.

"The Act is good as to the duties mentioned upon wines. It is unconstitutional in respect to the added duties on cigars and cheroots."

In the title of Act 99, S. L. 1913, the broad subject of "Licenses" is restricted to the ministerial act of issuing or giving them out. The word "issuance" is not defined by Anderson's

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or Bouvier's Law Dictionaries, nor in Words and Phrases. Webster's Dictionary defines it as a noun thus: "Act of issuing, or giving out; issue; as, the issuance of an order or of rations." Now, the ministerial act of giving out a license to follow an occupation is not akin nor allied to the act of paying personal or property taxes. The title in question is misleading. Section 1323, R. L., named therein, relating to the subject of the personnel of the officer who shall sign licenses, and the payment of a tax, delinquent or not delinquent, being no part of the act of issuing or giving out a license, and the conditions upon which licenses are to issue being prescribed in the other sections of chapter 102, R. L., no one would be able to read the title to Act 99, S. L. 1913, and get any intimation therefrom that said act contained a requirement that an applicant for a license should first pay all taxes assessed against him before making his application for a license.

In *Rouse v. Thompson*, 228 Ill. 522, it was held that the title, "An Act to Provide for the Holding and Regulation of Primary Elections of Delegates to Nominating Conventions, for the Holding of such Conventions, filling Vacancies and fixing Penalties for the violation of the Provisions thereof," did not embrace a general provision in the body of the act authorizing direct primary voting for particular candidates.

In the case of *Sewickley Township v. Sholes*, 118 Pa. 165, the subject of an act, as expressed in its title, was, "An Act to exempt from taxation public property used for public purposes." The act contained a proviso to the effect that all property not exempt should be subject to taxation. The court held the proviso void for the reason that it was not embraced in the title which showed a purpose to exempt from, and not make subject to, taxation.

In the case of *Hatfield v. Commonwealth*, 120 Pa. 395, the subject embraced in the title of the act involved was to prohibit the issuance of licenses within certain bounds and the first section so provided. The second section went further and prohibit-

ed sales within such bounds, and it was held void as not expressed in the title.

Holding, as we do, the said last proviso of Act 99, S. L. 1913, to be in violation of section 45 of the Organic Act and void, it is unnecessary to discuss or decide the other points upon which said proviso is attacked.

It is argued on behalf of the Territory that if the proviso to Act 99, S. L. 1913, under consideration, be void, the defendant was relegated to his remedy of mandamus to compel the issuance of the license for which he applied and tendered the fee, and was properly found guilty of violating section 1418, R. L., in that he drove a hack without the required license. We take the contrary view. Having tendered the required fee for the license and a certificate, showing his examination and qualifications, made by the sheriff, he did all that he could do to obtain such license and was entitled to proceed with his usual occupation of driving a hack. This point is settled and well stated in the case of *Royall v. Virginia*, 116 U. S. 572.

Query: If Act 99, S. L. 1913, be enforced in its entirety, would it not deprive those engaged in the occupation for which the license is required of the privilege accorded to all taxpayers by section 1264, R. L., as amended by Act 97, S. L. 1905, and as further amended by Act 146, S. L. 1911, of paying one-half of their taxes May 15, and the other half November 15, of each year? By the provisions of section 1183, R. L., as amended, all taxes are assessed as of and due January 1 of each year. Now the proviso under consideration is not limited to the payment of delinquent taxes, but requires the payment of all taxes due, which would include those assessed for the year in which the application for a license is made. This would seem to deny one in a licensed occupation the right and privilege aforesaid. But whether this of itself would be sufficient to avoid the proviso we deem it unnecessary to consider or to determine.

The judgment appealed from is reversed and the cause re-

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manded to the district court of the city and county of Honolulu with directions to enter a judgment discharging the appellant.

P. L. Weaver, Deputy City and County Attorney, for the Territory.

E. K. Aiu for defendant.

DISSENTING OPINION OF ROBERTSON, C. J.

I am obliged to dissent. The cases referred to in the majority opinion, do not, in my judgment, sustain the conclusion to which they are cited. They purport to be and are in harmony with principles heretofore recognized by this court to the effect that the organic provision that "each law shall embrace but one subject, which shall be expressed in its title" should receive a liberal construction in favor of legislation (*In re Walker*, 9 Haw. 171; *Dole v. Cooper*, 15 Haw. 297; *Ahmi v. Buckle*, 17 Haw. 200) and that it is sufficient if the various parts of an act have a natural connection, are fairly well embraced in one subject, though somewhat general, and expressed in a title which is sufficiently comprehensive and not misleading (*Dole v. Cooper*, supra; *Territory v. Dondero*, 21 Haw. 19).

In *Dolese v. Pierce*, 124 Ill. 140, it was held that an amendment to a statute relating to "township organization" whereby an attempt was made to change the boundaries of "cities and incorporated villages" was held to conflict with the constitutional provision for the all sufficient reason, as explained by the court, (p. 148) that "while townships are regarded as municipal corporations, in the general sense of that term, yet they stand upon a plane altogether different from that occupied by cities and villages. * * * They are, in law and in fact, as distinct from one another as any two artificial beings could be, whatever their supposed resemblances may be." In *Hyman v. Kapena*, 7 Haw. 76, it was held that an act entitled "An Act amendatory of section 2 of Chapter XXVIII of the Session Laws of 1878, relating to import duties upon wines" would not permit the

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including of a provision fixing a duty upon cigars. The reason is obvious, and there can be no question as to the correctness of the decision. The other cases cited are as easily distinguished.

In *Carter County v. Sinton*, 120 U. S. 517, 522, a Kentucky case was approvingly quoted as follows: "This prohibition should receive a reasonable and not a technical construction; and looking to the evil intended to be remedied, it should be applied to such acts of the legislature alone as are obviously within its spirit and meaning."

That a statute providing that no license shall be issued until the applicant therefor shall have filed with the treasurer a certificate showing the payment in full of all taxes due from said applicant, is an act "relating to the issuance of licenses" is so clear that the mere statement of the thing convinces. A license is nothing until it is issued, and it would seem that a title "relating to the issuance of licenses" is practically as broad as one "relating to licenses." In *Republic v. Akau*, 11 Haw. 363, 369, this court said "In a statute relating to certain licenses it is proper to specify the conditions upon which the licenses may be granted."

It has been said that the real object of the legislature in enacting the amendment in question was to reach delinquent taxes. That is conceded, but, as pointed out in *Lien v. County Commis.*, 80 Minn. 58, 64, "It is not fatal that the objects and purposes of the act are not expressed in full in the title. Our constitution does not require the title of an act of the legislature to be so broad. It requires the subject of each act to be so expressed but not the 'purposes' or 'objects' of the proposed statute. The objects of an act may not always appear from the subject as expressed in the title." See also *State v. Cantwell*, 179 Mo. 245, 260. It may also be conceded that the amendatory act could appropriately have been given a title with reference to the collection of taxes, but the rule is that where an act may properly be entitled under either of two subjects it is sufficient if it be entitled under one of them. *Hoskins v. Crabtree*,

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103 Ky. 117. To hold that the title "relating to the issuance of licenses" must be held to confine the subject to the ministerial act of giving out licenses is, it seems to me, to give the organic provision the opposite of a "liberal" construction. "A critical construction will not be made of the title to hold a statute unconstitutional, but on the contrary the language used is in all cases given a liberal interpretation and the largest scope accorded the words employed that reason will permit in order to bring within the purview of the title all the provisions of the act." *State v. Closser*, 179 Ind. 230, 235. "To construe it strictly would, by hampering legislation, cause as great evil in one direction as was intended to be prevented in the other direction." Per Frear, J., in *In re Walker*, supra.

Section 1323 is a part of chapter 102 on "Licenses," and is included, with other sections, under the sub-head "General Provisions." It would seem to be a highly suitable place in which to place a new general provision such as that in question, and I think it is of small moment that it was incorporated as a proviso to that section instead of being made a separate new section. The catch phrase to the section, introduced by the code commission, "Signed by whom," is, strictly, not a part of the section, and should not be regarded as forever limiting the subject matter of the section. The purpose of the amendment of 1913 was to enlarge the scope of section 1323, and the title of the amendatory act was appropriate and sufficient, as I believe, to accomplish that effect.

Under a title amending a certain act and stating its title any alteration may be made and any provision may be enacted which might have been incorporated in the original act. 1 Lewis, Southerland, Stat. Con. (3d ed.) Sec. 137; *Edler v. Edwards*, 34 Utah 13, 19; *Holden v. Supervisors*, 77 Mich. 202. In such case it matters not that the new matter is not cognate to the section amended. *State v. Madson*, 43 Minn. 438, 442. An act to amend a section of a code or revision is sufficient if it specifies the section to be amended without giving the title

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to which it belongs or in any way indicating the subject matter of the section. Under such a title any legislation is proper which is germane to the section specified. 1 Lewis, Southerland, Stat. Con. Sec. 141. But the rule that when the title of an act is to amend a particular section by number the proposed amendment must be germane to the subject matter of that section applies only when there is nothing else in the title to indicate the subject of the legislation. *State v. Barton*, 91 Neb. 389. In the case at bar the title of the amendatory act not only gave the number of the section amended but also stated the subject of the act.

L. B. KERR & COMPANY, LIMITED, PLAINTIFF, *v.*
J. L. GREENBAUM, MOSE GREENBAUM, ISAAC
GREENBAUM AND AARON GREENBAUM, PART-
NERS, DEFENDANTS, AND THE IDEAL CLOTH-
ING COMPANY, LIMITED, GARNISHEE.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 6, 1914.

DECIDED NOVEMBER 21, 1914.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ASHFORD,
IN PLACE OF QUARLES, J.

GARNISHMENT—nature of proceeding—nonresident defendant.

The garnishment of a debt due to a nonresident, unless he appears in the action, is a proceeding *quasi in rem*. Actual service upon the garnishee within the Territory gives the court jurisdiction over the *res*. Service of process on the defendant is not necessary, but reasonable constructive notice of the attachment must be given.

SAME—service of process on garnishee sufficient notice to nonresident defendant.

Under Sec. 2114 R. L. service of process upon the garnishee is sufficient notice to a nonresident defendant who has never resided

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in this Territory to enable the plaintiff to bring the action to trial though the garnishee be the mere debtor of the defendant. But before judgment be entered the defendant should have had a reasonable opportunity to contest the plaintiff's claim.

OPINION OF THE COURT BY ROBERTSON, C. J.

The plaintiff, a Hawaiian corporation, instituted an action of assumpsit in the district court of Honolulu, against the defendants, copartners, and residents of New York, and alleged that the garnishee, also a Hawaiian corporation, is indebted to the defendants. Summons issued in the usual form, the sheriff's return thereto stating that the defendants are not inhabitants of the Territory of Hawaii and have never resided therein; that he served the garnishee by leaving a true and attested copy of the summons and declaration in said action with one Forster, its secretary and treasurer; and that he served the defendants by leaving with said Forster a true and attested copy of said summons and declaration for said defendants. Section 2114 of the Revised Laws provides that service upon the garnishee "shall be sufficient notice to the defendant to enable the plaintiff to bring his action to trial, unless the defendant be an inhabitant of this Territory, or has sometime resided therein, and then a like copy shall be served personally upon him, or left at his last and usual place of abode."

The garnishee appeared by counsel and moved to dismiss the action on the ground that the court had not acquired jurisdiction of the persons of the defendants in that the defendants had not been served actually or constructively, and no one representing them as attorney, factor, agent or trustee, had been summoned or notified to defend the action. The motion was overruled, and the plaintiff obtained judgment against the defendants and the garnishee in the sum of \$115.97. The garnishee appealed to the circuit court, jury waived. The case being called up for trial in the circuit court, the garnishee renewed its motion to dismiss, whereupon the court reserved the

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question whether the district court and the circuit court had acquired jurisdiction of the defendants.

The precise point involved was not accurately stated in either the garnishee's motion or the court's certificate of reservation, though it has been argued. The question is whether such notice has been given the defendant as will enable the plaintiff to bring the action to trial, and warrant the court in proceeding to judgment. Actual service being made upon the garnishee within the Territory, the debt is attached in his hands and jurisdiction is thus acquired over the *res*. The principal defendant being nonresident jurisdiction over him cannot be obtained and is not necessary. It is a proceeding *quasi in rem*. "If there be a law of the State providing for the attachment of the debt, then if the garnishee be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that State. * * * Power over the person of the garnishee confers jurisdiction on the courts of the State where the writ issues." *Harris v. Balk*, 198 U. S. 215, 222. See also *Chicago, etc. R. Co. v. Sturm*, 174 U. S. 710, 716. In *Veeder Mfg. Co. v. Marshall-Sanders Co.*, 79 Conn. 15, the court said (pp. 17, 18), "The garnishment of a debt due to a nonresident is, unless he appears in the action, in the nature of a proceeding *in rem*. A judgment *in personam* may be rendered against him in form, but it imposes no personal obligation. The court acts by virtue of its jurisdiction over the garnishee and its power to compel him to satisfy the execution to the extent of his indebtedness. * * * That indebtedness is regarded for this purpose as having a *situs* at the domicile of the debtor. * * * This statute did not make service on the garnishee equivalent to or any part of service of the process on the defendant. There was no need of any service on the defendant. None could be made which would bring him under the power of the court. The object of

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the law was simply to secure reasonable notice to him of the foreign attachment, so that he might have an opportunity to protect his interests in the subject of the attachment." On the question of reasonable notice to the defendant, this court said in *Bicknell v. Herbert*, 20 Haw. 132, 137, "Leaving a copy of the summons at the last and usual place of abode of the defendant is one of the modes of service authorized by our law and is a mode prescribed by the statutes in many of the states and has long been deemed to be well calculated to give to a party alive to the protection of his property and to the performance of his duties notice of the institution of the proceeding against him. Notice by publication is, perhaps, a method more often used as a substitute for personal service, but there is no distinction in principle between the one method and the other. Neither is based on the theory that it will necessarily give actual notice to the defendant but merely that it will give such notice to himself or to his agents if he cares to take reasonable precautions for the protection of his property." The judgment in that case was affirmed by the supreme court. *Herbert v. Bicknell*, 233 U. S. 70. [We are of the opinion that the requirement of the law as to notice to a defendant who is not and never has been an inhabitant of this Territory is met by the provision that actual service upon the garnishee is sufficient in such case.] In *Harris v. Balk*, supra, it was held to be the duty of the garnishee to give notice to his own creditor if he would protect himself so that the creditor may have the opportunity to defend himself against the claim. Here, then, the promptings of self-interest operate, whereas, in the case of leaving a copy of the summons at the last usual abode of the defendant, the element would probably, in most cases, not be present. In the case referred to, though no point was made of the matter, it is interesting to note that the statute provided merely that a copy of the summons and a statement of the plaintiff's claim should be posted at the door of the court house. 1 Pub. Gen. Laws, Maryland, Art. 9, Sec. 9.

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The contention of counsel for the garnishee that notice by publication should have been given under the general provisions of statute relating to actions against nonresident defendants, is met by the ruling made in *Bicknell v. Herbert* that they do not apply to proceedings commenced in a district court. And we may add, as a further reason, that the special provisions of the garnishment law apply to this class of cases to the exclusion of the general provisions.

It is contended that under the statute when the garnishee is a mere debtor of the defendant service upon him does not constitute notice to the defendant. Section 2114 provides that "whenever the goods or effects of a debtor are concealed in the hands of *his attorney, agent, factor, or trustee* * * * or when *debts are due from any person* to a debtor," process may be served upon "such *attorney, agent, factor or trustee* * * * to summon such *attorney, agent, factor, or trustee* to appear * * * and on oath disclose whether he has * * * any of the goods or effects of the defendant in his hands, and, if so the nature, amount and value of the same, *or is indebted to him, and the nature and amount of such debt* * * * all the goods and effects in the hands of such *attorney, agent, factor or trustee*, and every *debt due from such debtor* to the defendant, shall be secured in his hand * * * and such notice shall be sufficient notice to the defendant," etc. The contention is that while the statute provides that service upon the "attorney, agent, factor or trustee" of the defendant shall be sufficient notice to the defendant, it does not provide that service upon the "debtor" of the defendant shall constitute notice to him. The section is not as clearly worded as it might have been, but it contains internal evidence, as appears from the abbreviated quotation, of the intention of the legislature that the phrase "attorney, agent, factor or trustee" should include "debtor." Thus, the section says, that the "attorney, agent, factor or trustee," upon being summoned, shall appear and disclose whether the defendant "is indebted to him, and the nature and amount of such debt;" also, that service

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upon such "attorney, agent, factor or trustee" shall secure in his hand not only the goods and effects of the defendant but every *debt* due him from the defendant. The same phraseology appears in section 2115, though in section 2116 it is "attorney, agent, factor, or trustee or debtor." We believe it has been the uniform understanding of bench and bar that the phrase used in section 2114 was intended to include "debtors." The statute originally was chapter 35 of the Laws of 1876, and became chapter 135 in the revision of 1905. In 1907 the legislature added three new sections providing for the garnishment of "any salary, stipend, wages, annuity or pension" of which the defendant may be in the receipt from any "attorney, agent, factor or trustee," the phrase thus being used comprehensively as including "debtor" and "employer" and others who might not fall within any category mentioned should the words used be strictly interpreted. Act 99, Laws of 1907.

We hold that under section 2114, service of process upon a garnishee as the debtor of a nonresident defendant is sufficient notice to the defendant to enable the plaintiff to bring the action to trial and to authorize the court to proceed to judgment. But in a case such as this justice would require that before judgment is rendered the defendant shall have had an opportunity to contest the plaintiff's claim, and for the purpose of applying for a continuance in order that such opportunity be afforded the garnishee might represent the defendant.

A. S. Humphreys for plaintiff.

L. Andrews for garnishee.

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J. ALFRED MAGOON, EMMELINE M. MAGOON, JULIA H. K. ANDERSON, JOHN HENRY MAGOON, ALFRED K. MAGOON, EATON H. MAGOON, CATHERINE K. HUSTACE, MARMION M. MAGOON, EMELEEN M. TYLER, MELLIE E. HUSTACE, CECIL BROWN, TRUSTEE OF THE ESTATE OF KALEIPUA KANOA, A. B. JOHANSON MILL COMPANY, LIMITED, AN HAWAIIAN CORPORATION, AND HUSTACE-PECK COMPANY, LIMITED, AN HAWAIIAN CORPORATION, *v.* LORD-YOUNG ENGINEERING COMPANY, LIMITED, AN HAWAIIAN CORPORATION, AND CHARLES R. FORBES, SUPERINTENDENT, DEPARTMENT OF PUBLIC WORKS, TERRITORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 15, 16, 17, 1914.

DECIDED NOVEMBER 27, 1914.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF WATSON, J.

CONSTITUTIONAL LAW—*police power—right to trial by jury—due process of law.*

The validity of Chapter 83 of the Revised Laws, relating to the improvement of lands which are in an insanitary or dangerous condition, and deleterious to the public health, as determined in *Brown v. Campbell*, 21 Haw. 314, reaffirmed.

HEALTH—*insanitary lands—applicability of R. L. Chap. 83 to improved lands.*

Said chapter is not limited in its operation to vacant lands. There is no exception in favor of lands upon which buildings have been erected though their erection was not in violation of law and the buildings themselves are in good condition. Any loss or expense to which the owner may be subjected in connection with buildings upon lands which are required to be filled in must be regarded as incidental to the exercise of the power to require the abatement of insanitary conditions.

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SAME—owner—life tenant—remainderman—right of owner to notice under R. L. Secs. 1026 and 1027.

The word "owner" as used in R. L. Chap. 83, means one having a present interest in land with the right of possession other than a mere tenant or temporary occupant. A tenant for life is such an owner. A remainderman is not. An owner is not affected by proceedings instituted under the statute in the absence of notice given as provided in sections 1026 and 1027. Remaindermen would be entitled to be heard in another proceeding upon the claim, if it be made, that the operation proposed to be effected on the land is without authority of law and threatens unjustifiable injury to the inheritance.

SAME—sufficiency of notices—process—judgment—certainty.

The notice required to be given under the statute serves the purpose of process by means of which jurisdiction of the land owner is obtained, and such notice may become, and, in the absence of an appeal, does become what, in effect, is a final judgment. It must, therefore, be certain. A notice to a land owner to fill his land "to such grade that the surface of said piece of land when so filled in will be, as near as may be, in the same plane with the established grades of the streets nearest to said piece of land" when the grades of such streets have not been legally established is uncertain and insufficient, and is not to be regarded as capable of being rendered certain by the fact that there were maps in possession of the public authorities and available to inspection which showed the grades contemplated, such maps not having been referred to in the notice.

SAME—effect of failure of owner notified to appeal—findings of board of appeal—questions of law and fact—nuisance.

The question whether a thing may or may not be a nuisance within some provision of law must be settled as one of fact, and not of law. Upon a hearing before the appeal board, if an appeal be taken as allowed by the statute, the property owner could contest the finding of the board of health that his premises are in an insanitary or dangerous condition, and the recommendation that they should be treated in the manner outlined in the notice. The finding of the appeal board would be conclusive and binding if there was any substantial evidence to support it. But the land owner would be entitled to be heard in court on the contention that his land, not being in an insanitary condition or deleterious to health, and there being no facts upon which a conclusion that it was in such condition could rest, the board of health had exceeded its powers and proceeded without jurisdiction, as such contention would raise a question of law.

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SAME—*propriety of hydraulic method to fill land, and of the material thereby used—vacant land—occupied land.*

In filling and raising the level of insanitary land through proceedings under the statute, it is within the discretion of the superintendent of public works to contract for the filling of vacant lands by the hydraulic method and with the material used by that method in the manner described in this case. But where, in case land is occupied, such method would cause loss through the interruption of the use of premises for business or other purposes which might be avoided by following some other reasonable method, the hydraulic method is subject to objection by the land owner. If objection be made the land owner would assume the consequences of insisting on a more expensive fill. The material used in the hydraulic method held not to be injurious to lands situated as those of the Kewalo district in Honolulu.

DEEDS—*instrument testamentary in character—reservation of life estate.*

A deed of land containing operative words of present grant is not inoperative as being testamentary in character because of the reservation therein of life estates to the grantors nor because it contains a recital that the land should, upon the death of the grantors, go to the grantees "share and share alike."

INJUNCTIONS—*right to injunction as affected by laches—legal right.*

Where an injunction is asked in support of a strict legal right, the party is entitled to it if his legal right is clear; mere delay unaccompanied by circumstances constituting an estoppel will not defeat the remedy unless it has continued so long as to defeat the right itself. That expenditures have been made will not defeat the right to an injunction if the party otherwise is entitled to it.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is an appeal from a decree made by the third judge of the circuit court of the first circuit, sitting in equity, dismissing the bill of complaint in a suit for an injunction to restrain the respondents from filling and raising the grade of certain parcels of land owned by the complainants and situated at Kewalo, Honolulu.

It appears that at the time of an outbreak of cholera which occurred in Honolulu in the early part of 1911, bacilli of cholera were discovered in a pond upon the land of the Kanoa estate lying below King street near Ward avenue, and that the lands of the complainants, together with other lands situated in the

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locality bounded by King street, Ward avenue, Ala Moana and South street, comprising a total area of about two hundred acres, had been found by the board of health of the Territory to be deleterious to the public health in consequence of being low and below "the established grades of the streets nearest thereto" and at times covered or partly covered by water and improperly drained and incapable by reasonable expenditure of effectual drainage, and that said lands were in an insanitary and dangerous condition. This was reported by the board of health to the superintendent of public works with the written recommendation of the operation deemed advisable by the board to improve said lands, to wit, "That said lands be put in a sanitary and safe condition by improving the same in such manner as will effect such purpose, and more particularly that the same be filled to such grade as will be necessary for that purpose, and that in the opinion of this board such filling in should be to the following grade, to wit: to such grade that the surface of said piece of land when so filled in will be, as near as may be, in the same plane with the established grades of the streets nearest to said piece of land." And the superintendent was requested to take the necessary steps provided by law, and more particularly by Chapter 83 of the Revised Laws, as amended in 1911, to cause the lands to be so improved. Thereupon the superintendent sent notice to the property owners, enclosing a copy of the letter received by him from the board of health, and notifying the owners "to begin within twenty days from your receipt hereof to put said piece or parcel of land in sanitary and safe condition by improving the same in such manner as will effect such purpose, and more particularly that you cause the same to be filled in to such grade as will be necessary for that purpose, to wit, to such grade that the surface of said piece of land when so filled in will be, as near as may be, in the same plane with the established grades of the streets nearest to said piece of land," and that "in case you fail to begin work as aforesaid on the improvements of said piece of land within twenty days, and to com-

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plete such work within sixty days from your receipt of this notice, such work or so much thereof as may remain undone will be done by the Territory at the cost of the land benefited thereby." The principal features of Chapter 83 of the Revised Laws were summarized in the case of *Brown v. Campbell*, 21 Haw. 314, and it will not be necessary to set them out here. None of the complainants appealed from the findings or recommendation made by the board of health nor did they comply with the directions given in the notice of the superintendent of public works for the improvement of their lands. On May 23, 1912, the superintendent entered into a contract with the Lord-Young Engineering Company, Limited, the lowest bidder for the work, for the filling in of the area in question, the contract permitting the use of sand, coral and material dredged from the harbor or reef and the depositing of the same upon the land by the hydraulic method. A few of the property owners filled their premises with other material, but most of the work has been done by the contractor by the hydraulic method under the contract referred to. The contractor was about to proceed with the filling of the lands of the complainants by the same method when the present suit was instituted. After the bill was dismissed by the circuit judge an injunction was allowed by the chief justice restraining the prosecution of the work pending the determination of this appeal.

The issues raised, tried and argued involve the validity of the statute, and its applicability to improved property; the legality of the action of the board of health and the superintendent of public works; the sufficiency of the notices served on certain of the complainants; the right to notice of some of the complainants to whom notice was not given; the effect of the failure of the complainants who received notice to appeal from the findings and recommendation of the board of health as allowed by the statute, or to comply with the requirements imposed by the notice of the superintendent; the validity of the contract of the Lord-Young Engineering Company, and the pro-

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priety of the hydraulic method of filling, and of the material used; also the question of laches and estoppel, and the right of the complainants to injunctive remedy. Voluminous testimony was taken at the hearing and numerous exhibits were filed in the court below, and the case has been exhaustively briefed in this court.

The circuit judge held that under the decision of this court in *Brown v. Campbell* the failure of the complainants to take advantage of the appeal permitted by the statute foreclosed them from litigating in the case at bar any question, either of law or fact, which they might have presented to the board of appeal. He also held that under the circumstances shown by the evidence the material employed by the contractor and the manner of its application was desirable, proper and adequate. On the question whether the Magoons, other than the parents, J. Alfred and Emmeline M. Magoon, were entitled to notice, the circuit judge held that their interests in the premises are "too speculative, remote and contingent to demand or require" that any notice should have been given them. Several questions have been argued in this court which were not expressly dealt with in the decision of the circuit judge.

In the case of *Brown v. Campbell* this court held that Chapter 83 of the Revised Laws is a health measure enacted in pursuance of the police power; that in providing that the work of improvement of lands which are in an insanitary or dangerous condition shall be done by and at the cost of the owner of the land, or, in case he refuses to act, by the government at the owner's expense, and authorizing the sale of the land to satisfy the lien imposed thereon for the amount of the cost of the improvement and the expense of foreclosure and sale, does not constitute or provide for the taking of private property for public use without just compensation in violation of the Fifth Amendment of the Constitution; that in the proceeding provided for by said chapter the land owner is not entitled, under the Seventh Amendment of the Constitution, to a trial before a

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jury on the question whether his land is in an insanitary condition or deleterious to the public health; that the provisions of said chapter, requiring the giving of notice to the land owner of the decision of the board of health as to the condition of the land and of the nature and extent of the improvement required, and allowing an appeal from such decision to a board appointed by the circuit court, whose decision shall be final, with the opportunity to the land owner to be heard before such board of appeal, constitute due process of law, notwithstanding such board is not empowered to compel the attendance of witnesses or to administer oaths; that a land owner who has received the notice as provided for in the statute, pays no attention to the notice, does not claim that his land is not in the condition described in the finding of the board of health, and takes no steps to abate the nuisance, is not in a position to claim that he is absolved from taking any action because the notice served upon him may have been too precise; and that the provisions of the statute do not constitute a delegation to an administrative board of the power of taxation in contravention of the Organic Act.

Present day health and sanitary problems are such that courts should be prepared to go to the limit of legal authority in recognizing the importance and sustaining the validity of proper legislation designed to protect the community from pestilence and epidemics of disease. "With the growth of commerce and development of traffic with distant communities, and with the increase of population in trade centers, the importance of the subject increases, and modern experience shows that private convenience and individual freedom of action are required to yield to the public good in respects where formerly there was observed no necessity for legislative interference." *Territory v. Hop Kee*, 21 Haw. 206, 208. "It has very properly been held that powers conferred upon boards of health to enable them to effectually perform their important functions in safeguarding the public health should receive a liberal construction." *Territory v. Araujo*, 21 Haw. 56, 60. Nothing advanced in the way of

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argument or authority by counsel in the case at bar prompts us to qualify anything that was ruled in *Brown v. Campbell*, and we are satisfied that that case should be adhered to as to all points raised on this appeal which were there decided. But from what has been stated it will be observed that there are a number of questions presented here which were not involved in the former case.

The applicability of the statute to improved property. The evidence shows that upon the lands of the complainants are numerous structures, such as a large tenement building, a steam laundry, a planing-mill, stables, and a large number of small cottages, the floors of many of which structures would be below the level of the ground should the lots be filled up to the grade called for by the contract of the Lord-Young Engineering Co. Counsel for the complainants contend that the statute relates to the improvement of conditions on vacant lands only and was not intended to apply to lands upon which buildings have been erected; and that where, as here, the proposed operation would impair the usefulness and value of the buildings if they should be left below the surrounding surface, or necessitate the expenditure of large sums of money to raise them, it amounts to an illegal taking of property. The statute makes no reference to buildings or improvements upon lands which may be brought under its operation, but, on the other hand, its language is general and improved lands are not excepted from its provisions. We are not at liberty to read into the statute an exception in favor of lands upon which buildings have been erected though their erection was not in violation of any statute or regulation of the board of health. Nor can we assume that it was the intention of the legislature that lands which are in an insanitary condition and deleterious to the public health are to be exempt from renovation merely because there are buildings on them even though the buildings themselves are in good condition. We think that any loss or expense to which the owner may be subjected in connection with buildings upon lands which

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are required to be filled in must be regarded as incidental to the exercise of the power to require the abatement of the insanitary conditions. The supreme court has made clear the distinction between an incidental injury to rights of private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, and the taking, within the meaning of the Constitution, of private property for public use, holding that "uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking of property without due compensation." *New Orleans Gas Co. v. Drainage Com.*, 197 U. S. 453; *C. B. & Q. Railway v. Drainage Com.*, 200 U. S. 561; See also *Transportation Co. v. Chicago*, 99 U. S. 635; *Manigault v. Springs*, 199 U. S. 473, 484; *Jamaica Pond Aqueduct v. Brookline*, 121 Mass. 5. In *Widemann v. Thurston*, 7 Haw. 470, it was held that injury to property caused by changing the grade of a street so as to render warehouses on abutting land unsafe and impracticable for use is not a taking of property for which compensation must be made. And the fact that great expense may result to the individual does not make a police regulation invalid. *Woodruff v. N. Y. etc. R. Co.*, 59 Conn. 63, 93. Especially should this be so where, as under our statute (Sec. 1033), if the land is sold to satisfy the lien for the cost of the operation the owner is to be paid, in any event, the value of the land as shown by its last previous assessment for taxation. This would include the value of improvements.

As to the right of land owners to notice. Section 1026 of the Revised Laws makes it the duty of the superintendent of public works to serve upon the owner or occupant of the land a copy of the finding and recommendation of the board of health, and to notify him that in case of his failure to begin the work within twenty days or such further time as may be reasonable in special cases, and to complete it within a reasonable time to be named, the work will be done by the Territory at the cost of the land benefited. Section 1027 provides that "Service of such

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notice upon an owner in person, if within the Territory, or upon his agent if without the Territory, or upon the occupant of such land if the owner is unknown, or upon the guardian if the owner is a minor or person under guardianship * * * shall be deemed good and sufficient service." There are also provisions for service upon non-residents, and where the land is unoccupied and the owner unknown. The title to the "Magoon" lands is held under a deed dated January 3, 1908, by which J. Alfred Magoon and Emmeline M. Magoon, his wife, for the consideration of one dollar, conveyed to their children, J. H. Kamakia, John H. N., Alfred K., Eaton H., Mary Catherine, Marmion M. and Emeleen M. Magoon, the premises in question, but "Reserving to the grantors the right to take and receive all the rents, issues and profits thereof during their joint lives and the life of the survivor of them, the grantors to pay all the taxes, assessments and governmental charges thereon that shall be payable by any law now in force or that shall be payable by any law hereafter enacted." The deed contains a recital, "That whereas John Magoon did convey to the grantor J. Alfred Magoon, certain of the lands hereinafter described with the understanding and agreement that after the death of said John Magoon, the grantors should take and enjoy all the rents, issues and profits thereof for life, said lands upon their death to go to all the grantees share and share alike." Counsel for the appellees contend that the instrument is testamentary in character and passed no present interest to the grantees. We think the recital has no effect on the construction or operation of the deed. It merely states the motive for its execution. The operative words used were "give, grant, bargain, sell and convey," and their effect is not to be nullified or qualified by a recital which after all is not inconsistent with those words when taken in connection with the reservation. 1 Jones on Real Prop. Sec. 249. The fact that the grantors reserved life estates did not prevent the vesting at once of the remainder in the children. The deed was a good conveyance of the fee to the

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grantees subject to the joint life estate in Mr. and Mrs. Magoon. *Puukaiakea v. Hiaa*, 5 Haw. 484; *Keliilihune v. Vierara*, 13 Haw. 28; *Cable v. Cable*, 146 Pa. St. 451; *Knowlson v. Fleming*, 165 Pa. St. 10; *Bass v. Bass*, 52 Ga. 531. Of the parties to this deed the only one shown by the record to have been served with notice by the superintendent of public works was the father, J. Alfred Magoon. Mrs. Magoon, as the owner of an undivided present interest in the premises, was as much entitled to notice as her husband. The action taken by the board of health and superintendent of public works, therefore, in no wise affected her or her interest in the lands mentioned in the deed. The proceedings were, as to her, a nullity, and she is entitled to an injunction to restrain the proposed operation on the lands in which she has such interest.

Counsel for the appellees argue that the evidence shows that J. Alfred Magoon was the agent of all parties having interests in the lands described in the Magoon deed as to all matters concerning those lands. The testimony shows that he had the active management of the property, though he generally consulted with the members of his family in regard thereto; that he attended to the renting of the buildings; that he returned the property for taxation in his own name, and otherwise acted generally as the owner of the property. The contention is that if the Magoon children have such interests in the land as to require that they should be notified of any proposed action under Chapter 83 of the Revised Laws the notice to their father, their agent, was notice to them and that they were bound by it as fully as though they had been individually served, and that as to such of the children as are minors, notice to their father as their natural guardian was sufficient. Notice to an agent as to matters within the scope of his employment or authority is notice to his principal. But we are not dealing here with the mere matter of notice in the sense in which the term is used in the law of agency. The notice which the statute requires to be served on land owners by the superintendent of public works is

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process, and serves the purpose of original process of a court to obtain jurisdiction over the person of the party to be bound by the adjudication. Service of process upon one of several persons owning interests in land is not service upon the others. By the service of the notice on J. Alfred Magoon jurisdiction was acquired over him alone. See *Dowsett Co. v. McCandless*, 19 Haw. 430. We are of the opinion, however, that service of notice on the Magoon children was not necessary to the maintenance of the proceeding for the improvement of the land. We believe that the word "owner" in the statute means one having a present interest in land with the right of possession other than a mere tenant or temporary occupant. It is a general term the precise meaning of which depends on the nature of the subject-matter and the connection in which it is used. 27 A. & E. Enc. Law (2 ed.) 234; *McKee v. McCardell*, 22 R. I. 71; *Coombs v. People*, 198 Ill. 586. The statute furnished authority to deal with existing insanitary conditions, and one who, as a remainderman, has not and never had the right of immediate possession, is powerless to remedy them. Hence the intention of the law makers must have been that the notice is to be served upon the person who, as owner, is in control of the land. The lien for the cost of the improvement would attach only to the interest of such owner. The remaindermen would not be parties to the proceeding which has for its object the remedying of the conditions complained of by the board of health, and would have no right to be heard on the question whether the land is in an insanitary condition. Nevertheless, we are of the opinion that remaindermen would be entitled to be heard in another proceeding upon the claim, if it be made, that the operation proposed to be carried out is without authority of law and threatens unjustifiable injury to the inheritance. And we hold that the Magoon children are entitled to be heard in this suit upon the questions whether, as they and their cocomplainants aver, the public authorities have in this matter mistaken or deliberately exceeded the powers conferred on them by the statute,

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have proceeded without jurisdiction, and that the character of the material which the contractor proposes to use in raising the level of the land is such as will materially and unnecessarily injure the land, and is not within the authority of the superintendent of public works to permit to be used. This question will be discussed later. It is enough to say at this point that the Magoon children stand on the same footing in this connection as does their father. They hold their title to the land subject to the lawful exercise of the police power as does he. If the proposed filling of the land is authorized by law under the circumstances and in the manner it has been contracted for, the Magoon children will not be entitled to have the operation restrained merely because it will permanently injure the land and subject them to loss. They, as well as the other property owners, may be subjected to such damage as is incidental to the proper enforcement of the law.

As to the sufficiency of the notices. The complainants, other than Mrs. Magoon and the Magoon children, were served with notice in the manner and form above explained. It is contended that the notices were defective, insufficient and of no effect because they did not prescribe the manner in which the filling should be done; that the time allowed for the completion of the work directed to be done was insufficient and unreasonable; that the grades of the streets within the area mentioned were never legally established; that the grade commission which pretended to act was not legally constituted, and that the commission illegally delegated the work of establishing the street grades to others.

The courts in some cases have held that a property owner cannot be compelled to abate insanitary conditions in a particular way but may do it in any effectual manner. Whether such cases apply where, as here, the statute requires that the board of health shall provide "a brief recommendation of the operation deemed advisable to improve such land," and that if the plan be not changed by the appeal board, and the owner fails

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to proceed with the work, the superintendent of public works shall cause it to be done, may be doubtful. But here, the owners were notified of the general nature of the operation required to be done, and we think the notices were not defective in that the precise way in which the work should be done was not laid down.

The complainants claim that it was impossible to do the work required of them within the time allowed them to do it as specified in the notices. But if this were the only defect, and if the complainants were ready and willing to comply with the order if sufficient time were allowed, good faith on their part would require them to apply for an extension of time. We think that where a property owner who has received due notice to remedy deleterious conditions on his premises does not intend to comply therewith he cannot afterwards, with any show of good faith, ask that the superintendent of public works be restrained from doing the work in accordance with the requirements of the statute, merely because the time allowed by the notice, though substantial, was too short.

Chapter 54 of the Revised Laws, relating to street and sidewalk lines and grades, Honolulu (repealed in 1913), provided for the appointment by the governor of "a commission of three civil engineers * * * to establish the grades of all streets * * * in said city of Honolulu;" that "it shall be the duty of the commission * * * to carefully survey, level and grade the streets * * * as they may be directed by the superintendent of public works and make proper and complete plans and profiles of the same, with the grade lines and widths recommended by them, distinctly marked thereon. Such plans and profiles shall be signed by the commissioners, and the superintendent of public works shall countersign the same, and cause the official seal of the department of public works to be affixed thereto;" that such plans and profiles "shall be known as the official map showing grades and sewers of the streets * * * and they shall be preserved in the archives of the office of the superintendent * * *

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and shall be open, at all times, to the inspection of parties interested without charge." It is contended that in the attempt to establish the grades of the streets within the Kewalo district the statute, though not strictly adhered to, was substantially followed. We think that no importance is to be attached in this suit to the facts that the three persons appointed as grade commissioners were not all civil engineers, and that they had the services of assistants in doing the work. The commissioners were at least *de facto* officers, which is enough upon a collateral attack; and it was within their discretion to employ assistants, the work being done under their direction and supervision and adopted by them. It appears, however, that no profiles were made of the streets in question, and that the final map which the commission prepared, and upon which the grades were marked, the same being designated "Proposed grades for a section of Kakaako bounded by King St., Ward Ave., Ala Moana and South St., Jan. 11, 1912," though signed by the grade commissioners was not countersigned by the superintendent of public works, nor was the seal of his department affixed, as required by the statute. Furthermore, except as to the A. B. Johanson Mill Co., Limited, the notices to fill the lands were served upon the parties prior to January 1912. Also, it appears that the grade commission was set in motion, not by the direction of the superintendent, but by the request of the president of the board of health, made on May 15, 1911; and that two other maps showing the grades recommended by the commission were made and delivered to the superintendent of public works and the board of health on or about August 24, 1911. Neither of these maps was signed by the grade commissioners or the superintendent of public works, though it appears that upon them were based the notices sent to the property owners, as well as the contract of the Lord-Young Engineering Company.

There was not even a substantial compliance with the statute and we are obliged to say that the grades of the streets in ques-

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tion were never legally established under R. L. Chap. 54. But it is urged by counsel for the appellees that the legal establishment of the street grades was not a necessary prerequisite to action by the board of health, and that the grade contemplated by the board and referred to in the notices could easily have been ascertained by the complainants by inquiry, as, the evidence discloses, was done by other property owners upon whom similar notices were served. No doubt the public authorities could require the filling in of insanitary land even though the nearest streets had never been given an official grade, provided the notice be sufficiently certain as to what is required to be done by the owner. Under our statute the notice given by the superintendent of public works requiring compliance with the recommendation made by the board of health not only serves the purpose of process upon the land owner, but, upon appeal, may become, and, in the absence of an appeal, necessarily becomes, what, in effect, is a final judgment. Hence, it is necessary that such notice should, as to the nature of the operation required to render the land sanitary, be sufficiently certain to apprise the owner of what is required of him. This goes to the very root of the notice and order, for if they were void for uncertainty the parties are in the position of persons without any notice whatever. It is argued that the maxim *certum est quod certum reddi potest* applies—that the uncertainty in the notice could have been removed by inquiry at the office of the board of health or of the public works department. Cases applying the maxim are cited in which deeds, awards and judgments which referred to other deeds, pleadings or other documents to supply something lacking were held to meet the requirement of certainty. In those cases, however, the instrument attacked invariably contained within itself reference to the document or paper which was relied on to supply the missing matter. But in this case the notices served on the property owners did not refer to any map or record from which could be ascertained what grades the persons notified were required to fill their lands

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to. We hold the rule to be that where reference to a map or record is necessary to render the terms of a judgment certain under the maxim *certum est quod certum reddi potest* such map or record must be mentioned and identified in the judgment itself. We have found no authority to support the notion that that is certain which may be rendered certain by an informal and voluntary inquiry. It is said that it was sufficient that, as shown by the evidence, the grades of the streets bordering the Kewalo district on three sides, namely, King street, South street and Ala Moana, had previously been legally established, even though the intermediate intersecting streets had no official grades, and that the notices could be construed as referring to those streets. We think the notices which specified the plane of the streets "nearest to said piece of land" could not be so construed. Finally, it is contended that any defect or irregularity in the establishing of the grades of the intersecting streets was cured and the grades as attempted to be established were validated by Act 130 of the Session Laws of 1913. That act recited that a contract had been entered into with the Lord-Young Engineering Company for the filling of certain insanitary lands at Kewalo and vicinity; that certain of the owners of lands covered by the contract had filled in, or were desirous of filling in, their lands; and that it was desired to reduce the grade of the locality. It then authorized the superintendent of public works to contract with said company, without calling for tenders, for the filling in of other insanitary lands in Honolulu in an amount not exceeding the estimated reduction that might be caused in the fill under said contract of May 23, 1912, either by acts of the land owners or by the reduction of the grade. It was the purpose of the act to allow a change to be made in the terms of the Lord-Young Engineering Company's contract, but, so far as we are able to discern, was not intended to be a curative act to validate grades of streets that had not been established in the manner provided by law, and we think it should not be so construed. Even if the act be

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capable of such construction it would not operate to render certain the ambiguous notices served on the land owners long prior to its enactment. Conceding the correctness of the observation made in *Bittinger v. Bell*, 65 Ind. 445, 459, cited by the appellees, that "It is not to be expected that the orders of a board of commissioners will be drafted with that degree of legal accuracy and precision of statement usually found in the orders, decrees and judgments of the circuit court," it does not follow that such orders may be wholly wanting in the essential element of certainty and yet be valid. We hold that the notices issued by the superintendent of public works, which, if otherwise regular would have become final orders, were, because of their uncertainty, fatally defective and of no binding effect upon those on whom they were served.

As to the effect of the failure of the complainants who received notices to take an appeal. The provisions of the statute regarding an appeal from the findings and recommendation of the board of health are, in substance, as follows: Section 1028 allows "any owner or occupant of the land sought to be improved" to "file an appeal from the decision of the board of health condemning the land as deleterious to the public health, or from its decision as to the nature and extent of the improvements to be made, with the superintendent of public works, whereupon the superintendent shall transmit the appeal to the circuit court of the circuit wherein the land is situated." Section 1029 provides that "said court shall thereupon appoint three disinterested persons who shall sit as a board to hear and determine whether or not the land is deleterious to the public health and whether improvements of the nature designated in such notice are required, and if such improvements are not required, what, if any, improvements are required in order to render such land sanitary. The decision of a majority of the board as to the necessity and nature and extent of the improvements shall be final and conclusive upon all parties in interest. The board shall appoint a time and place for hearing, first giv-

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ing notice thereof to the president of the board of health, the superintendent of public works, and to the owner or occupant of the land in question." Section 1029A, enacted in 1911 (Act 112), provides that "The superintendent of public works shall transmit to the board with such appeal a plan of the lands to be improved, showing, so far as practicable, the names of the owners and occupants thereof, together with a statement showing the extent and nature of the contemplated improvements, and an estimate of the cost thereof." Counsel for the appellees contend that the complainants "not having availed themselves of the statutory appeal, have lost all right to question the findings of the board of health, and the statute does not seem susceptible of any other construction." The contention of counsel for the complainants is that the appeal board could not consider any question of law; that it could only pass upon facts; and that as to the facts its decision could not be made final because the question what is and what is not a public nuisance is a judicial one upon which the party is entitled to be heard in court. In their brief counsel cite a number of cases in which it has been held that a thing cannot be declared a nuisance which is not so in fact. The principle may be conceded, but most of the cases cited were dealing with municipal ordinances, between which and statutes, as pointed out in Freund on the Police Power, Sec. 142, there is some difference, a broader power being conceded to rest in the coordinate branch of the government than in the local authority. Again, most of the citations are of cases in which the alleged nuisance had been subjected to summary abatement, either without notice to the owner, or, if with notice, without the right of appeal before the abatement. Cases of that class are to be distinguished from that to which the case in hand belongs.

Where a nuisance is abated or property is destroyed by the public health authorities without notice to the owner and an opportunity to be heard the finding or declaration of the board on the question of nuisance is not binding on the owner, but

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the whole question is open for review in the courts. *Akwai v. Royal Ins. Co.*, 14 Haw. 533, 537; *North American Storage Co. v. Chicago*, 211 U. S. 306, 316; *Salem v. Eastern R. Co.*, 98 Mass. 431, 447. But a statute which provides for an appeal from the findings of the board of health to an impartial board, and a hearing before action is taken, is not invalid because it makes the decision of the appeal board final without recourse to the courts. *Hibben v. Smith*, 191 U. S. 310, 321; *State v. Stewart*, 74 Wis. 620, 629; *Ross v. Supervisors*, 128 Ia. 427, 439. "The claim set up on the part of the lot owner, that there can be no due process of law under which an assessment can be made which does not provide for a review of such assessment and a hearing by a court, is not tenable." *Hibben v. Smith*, supra. Under a statute of New York containing provisions similar to those contained in our statute except that the hearing provided for was to be had before the board of health itself, it was held that the provisional order made by the board became final by the failure of the party, after being notified, to demand a hearing. *Reynolds v. Schultz*, 34 How. Pr. 147, 159. By enacting Chapter 83 of the Revised Laws the legislature assumed—and in effect declared—that land which by reason of its situation and condition, though through natural causes, is in an insanitary and dangerous condition and deleterious to the public health is a nuisance. *Valentine v. Englewood*, 76 N. J. L. 509, 521; *Harrington v. Board of Aldermen*, 20 R. I. 233, 249. See also, *Bowes v. Aberdeen*, 58 Wash. 535; *Charleston v. Werner*, 17 S. E. 33. This, we held in *Brown v. Campbell*, the legislature had the right to do. The question whether a thing may or may not be a nuisance within some provision of law must be settled as one of fact, and not of law. *Grossman v. Oakland*, 30 Ore. 478, 484; *Des Plaines v. Poyer*, 123 Ill. 348, 351. And the fact whether a certain piece of land is in an insanitary and deleterious condition so as to be subject to improvement under the provisions of the statute is to be decided by the board of appeal, if an appeal has been lodged,

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or by the finding of the board of health as reported to the superintendent of public works when no appeal is taken. Upon a hearing before the appeal board the property owner could contest the finding of the board of health that his premises are in an insanitary or dangerous condition, and the recommendation that they should be treated in the manner outlined by the board in its report. The finding in either case would be conclusive and binding if there was any substantial evidence to support it. We hold, however, that the finding of the board of health and the decision of the board of appeal may be attacked in a proceeding such as the case at bar on the ground that there were no facts existing which could be regarded as supporting the conclusion. The complainants maintain that their lands are not in an insanitary condition or deleterious to health; that there were no facts upon which a conclusion to that effect could rest; that the scheme adopted by the board was not in reality a health measure, but a general reclamation scheme and public improvement which could be accomplished only through the exercise of the right of eminent domain; and that the board of health has exceeded its powers and proceeded without jurisdiction. The complainants were entitled to be heard on this contention as it presented a question of law to be determined by the court. In the case of *Grace v. Bd. of Health*, 135 Mass. 490, which was certiorari to quash certain proceedings and an assessment made by the board of health for the purpose of abating a nuisance by draining land, the court said (p. 499), "On such facts as are before us we cannot say that the nuisance was not such as could not be abated pursuant to the St. of 1868, c. 160. As the persons who had notice were distinctly informed that the board of health were proceeding under the St. of 1868, c. 160, it was their duty to make this objection at the hearing. Having neglected to do this, they cannot now, after the work has been finished, the benefits received, and the expenses incurred, avail themselves of this objection for the purpose of quashing the proceedings *unless it appears that the nuisance was not within*

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the statute." The circuit judge erred in holding that the failure of the complainants to take an appeal from the findings of the board of health precluded them from raising in this case the question of law, and in refusing to allow them to put in evidence in support of the claim. They ought not to have been so precluded even if the notices served upon them had been regular and sufficient.

The right to a permanent injunction affected by laches. The evidence shows that the contractor's preparations to do the work of filling the area in question were completed in June 1913; a dredger had been built near the foot of Ward avenue specially for this work at an expense of about \$70,000; pipes had been laid and the work was proceeded with until this suit was commenced on March 4, 1914, at which time about two-thirds of the entire area had been filled in; that all this work had been done in full view of the people of the locality; and that the complainants knew the work was going on and that it was proposed to fill their lands in due course. Counsel contend that, under these circumstances, the complainants, by their failure to move promptly, have forfeited any right they may have had to equitable relief; that they should be relegated to such damages, if any they are entitled to, which they may be able to recover at law; and that "to permit a permanent injunction at this late hour would be inequitable in the extreme."

The case of *Roberts v. N. P. R. Co.*, 158 U. S. 5, was cited. In that case the court said (p. 11), "It has been frequently held that if a land owner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages." In such cases, the railroad company having the power of emi-

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nent domain, and being entitled to take land in a proper proceeding upon payment of compensation, the land owner loses nothing through being confined to his action for damages. In the case of *New York City v. Pine*, 185 U. S. 93, the court, after referring to decisions in that class of cases, said (p. 103), "These views do not justify the conclusion that a court of equity assumes a general right to ignore or supersede statutory provisions for the ascertainment of the amount of compensation in cases of condemnation. They simply mean that a failure to pursue statutory remedies is not always fatal to the rights of a party in possession, and that sometimes if full and adequate compensation is made to the plaintiff the possession of the defendant will not be disturbed." Obviously, such cases have no application to the case at bar. This court has held that an attempt to take land under an alleged but non-existing right of eminent domain will be restrained by injunction. *Haw. Com. & S. Co. v. Kahului R. Co.*, 11 Haw. 479. The case of *Easton v. N. Y. & L. B. R. Co.*, 24 N. J. E. 49, was also cited. In that case an injunction to restrain the completion of a bridge was refused. The complainants had stood by until an expense of about \$200,000 had been incurred before commencing suit, though they had previously protested. That case is simply authority for the proposition that though a complainant might have obtained an injunction to restrain the construction of a public work had he made application promptly he will not be entitled to it after large expense has been incurred and the *status quo* cannot be restored.

The length of time which must elapse in order to show laches varies with the peculiar circumstances of each case and is not subject to any arbitrary rule. *Halstead v. Grinnan*, 152 U. S. 412; *Lucas v. Am. Haw. E. & C. Co.*, 16 Haw. 80, 87. Delay is a fact to be considered with other facts in determining whether or not an injunction should be granted. *Ideta v. Kuba*, ante, p. 28; *Dunbar v. Green*, 66 Kan. 557, 567. Laches, in legal significance, is not delay, but delay that works disadvan-

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tage to another. 5 Pom. Eq. Jur. Sec. 21; *Gallihier v. Cadwell*, 145 U. S. 368, 373; *Ruckman v. Cox*, 59 S. E. (W. Va.) 760, 762; *London & S. F. Bank v. Dexter Horton & Co.*, 126 Fed. 593, 601. But where, as in the case at bar, an injunction is asked in support of a strict legal right, the party is entitled to it if his legal right is clear; mere delay unaccompanied by circumstances constituting an estoppel will not defeat the remedy unless it has continued so long as to defeat the right itself. 2 Pom. Eq. Jur. Sec. 817; *Menendez v. Holt*, 128 U. S. 514, 523; *Missouri v. Illinois*, 180 U. S. 208; *Galway v. M. E. R. Co.*, 128 N. Y. 132, 153, 155; *Rigney v. Tacoma L. & W. Co.*, 26 L. R. A. (Wash.) 425, 429. That expenditures have been made does not defeat the right to an injunction in this class of cases. *N. Y. Rubber Co. v. Rothery*, 107 N. Y. 310, 314; *Chapman v. Rochester*, 110 N. Y. 273.

Although the lands owned by the complainants comprise a substantial portion of the area to be filled under the contract of the Lord-Young Engineering Company, we do not understand it to be contended that the dredger would not have been built and the other lands filled had the complainants at the outset protested against the filling of their lands or commenced suit to prevent it. The contractor did not rely upon any act or representation of the complainants, or any of them, nor upon their omission to do anything that the law required them to do. There is no estoppel.

As to the propriety of the hydraulic method of filling, and of the material thereby used. This question affects the Magoon children as well as the other complainants and we will discuss it briefly, though, for reasons above set forth, the decree of the circuit judge must be reversed.

The contract authorized the hydraulic method of fill, it having been adopted because of its being the most economical method of doing the work. By this method the material dredged is carried in suspension or by the influence of water which is forced through large pipes and laid upon the lands

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and intervening streets, and afterwards is distributed and leveled, the water having drained off through ditches provided for the purpose. The work is done in large sections around which bulkheads have been constructed. A section can be filled in about thirty days, the dredger working about fifteen hours per day. And in about two months after a section has been filled the ground will have dried out so as to be fit for use as before. The objection urged by the complainants against this method is that it would unreasonably and unwarrantably deprive them of the use of their premises during the process of filling and while drying out. The character of the material varies from very fine sand to coarse bits of coral, and so far as the filling of swamps, ponds and vacant lands is concerned there would seem to be no reasonable objection to the use of the hydraulic method or material of this kind. It would be well within the discretion of the superintendent of public works to prescribe such method and material. But it is quite a different matter when considered with reference to premises upon which people live or on which business is being carried on. As to such places the loss and inconvenience attendant upon the filling of the land by any appropriate method would have to be regarded as necessarily incidental to the enforcement of the law, but loss caused through the interruption of the use of premises for business or other purposes which could be avoided by following some other reasonable method cannot be regarded as merely consequential in the face of objection by the land owner. By failing to comply with a proper notice duly served under the statute a land owner would be regarded as having consented to the work being done by the superintendent of public works at the expense of the land, but such consent could only be regarded as having been given to the filling of the land in a manner which would not cause damage that could reasonably be avoided, and this, we believe, would give the owner the right to object to a method which, though proposed in good faith by the superintendent on the ground of economy, would cause avoidable loss. The owner,

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of course, would have to take the consequences of his election to insist upon a more expensive fill.

There is some conflict in the testimony relating to the propriety of using material dredged from the reef and flats. The members of the court, accompanied by counsel, inspected the area in question and visited other places which had been filled by the hydraulic method with similar material. Counsel for the complainants contend that the hydraulic fill is highly improper because it will interfere with the natural drainage of the lands so filled, and in that it destroys plant life. It appears in evidence that through the method employed the finest of the material which is carried upon the land settles when the water which transports it becomes quiet and as the water runs off a sludge or mud remains which forms a strata more or less impervious to water. This strata, however, is covered by the coarser and more porous material. And the evidence shows that the material produced by this method has antiseptic properties not possessed by ordinary dry earth. It further appears that much of the vegetation that is not killed by being covered with the material used is destroyed by the salt water; and that except plants and trees that are particularly resistant to salt, such as oleander, algeroba, ironwood, kamani, and certain varieties of palms, also Bermuda grass, vegetation will not thrive on land covered with such material. On the other hand it appears that by mixing in to a depth of a few inches ordinary soil small plants will grow without difficulty; that the natural rainfall will in the course of time wash out most of the salt; and that the area upon which it would be desired to grow plants is small compared with the whole of the area in question. The character of the locality must be considered. It is not adapted to agriculture, but is suited more particularly to such business purposes as it is now partly used for, such as stables, laundries, warehouses, mills, etc., and for cottages with small yards for the accommodation of laborers engaged in connection therewith. Upon the whole, we are of the opinion that the material pro-

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posed to be used in the filling of the lands of the complainants is not of a character as should be held to be improper for any of the reasons urged.

The decree appealed from is reversed. A decree granting a permanent injunction, as prayed for, without prejudice to the right of the superintendent of public works, upon request of the board of health, to proceed anew under Chapter 83 of the Revised Laws, will be entered in this court.

J. A. Magoon and C. H. Olson (Holmes, Stanley & Olson with them on the brief) for complainants.

A. G. Smith, Deputy Attorney General (I. M. Stainback, Attorney General, with him on the brief), for the superintendent of public works.

F. W. Milverton (Thompson, Wilder, Milverton & Lymer on the brief) for the Lord-Young Engineering Company.

CHARLES J. SCHOENING, FRED P. ROSECRANS
AND DAN T. CAREY, CO-PARTNERS UNDER
THE FIRM NAME OF C. J. SCHOENING & COM-
PANY, PLAINTIFFS AND DEFENDANTS IN
ERROR, *v.* WILLIAM MINER, DEFENDANT AND
PLAINTIFF IN ERROR, AND CHARLES WILCOX,
AUDITOR OF THE COUNTY OF MAUI, TERRI-
TORY OF HAWAII, GARNISHEE.

· ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

ARGUED NOVEMBER 23, 1914.

DECIDED DECEMBER 4, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*exceptions—writ of error—waiver.*

The defendant, against whom a judgment in a jury waived case was entered, appealed on exceptions and attacked the judgment on the ground that it was "contrary to law, the evidence and

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weight of evidence;" the exceptions were overruled; the defendant then sued out a writ of error attacking the judgment as contrary to law on the ground that the trial court failed to render its decision in writing stating the reasons therefor as required by Act 117, Laws 1909. Held, that the defendant is precluded by the decision upon his exceptions from making the objection upon writ of error, and by failure to make such objection on his former appeal waived the same.

SAME—decision in jury waived case—mandatory statute.

While the statute requiring the trial court in a jury waived case to render its decision in writing giving the reasons therefor is mandatory, a failure to render such decision, while reversible error, does not make the judgment void.

SAME—execution—*conditioi exponas*.

The regularity of the issuance of writs of execution and *conditioi exponas* by the clerk, and a sale thereunder by the sheriff, cannot be reviewed on writ of error.

OPINION OF THE COURT BY QUARLES, J.

This case came before us on exceptions, the fourth exception challenging the correctness of the judgment "on the ground that said judgment was contrary to the law, the evidence and weight of evidence," and we overruled the exceptions (ante page 196). In the opinion, in passing on the fourth exception, it was said: "The fourth exception challenges the correctness of the judgment. There is no exception in the record to the decision of the court upon which the judgment is based. It has been held by this court that in a jury waived case the decision of the court takes the place of a verdict, hence this exception, which goes to the judgment only, does not question the decision, and only raises the question as to the form of the judgment, which the plaintiffs have not questioned, nor discussed either in briefs or oral argument." (Ante page 203.) The case is now before us on writ of error, and the judgment is attacked as erroneous and void upon the assigned error that there was no decision made by the trial court as required by Act 117, Laws 1909. It is apparent that under the fourth exception referred to, and as a basis therefor, the defendant could have set forth that the judgment is contrary to law for the reason that no decision was

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filed as required by said statute. The record in the case when first before us, contained no copy of the decision required by the statute, and did not contain any statement by way of exception or otherwise to the effect that there was no decision. An appellate court does not search for error in order to reverse a judgment, but only passes upon errors complained of by the appellant. This court could not presume that there was no decision merely from the fact that the record did not show that there was one, especially as there was no complaint that such decision was not made, and no objection to the judgment upon the ground that there was no decision to support it. Under such circumstances the presumption is that the trial court performed its duty and made the required decision. In 4 Ency. Pl. & Pr. 288, the rule is stated thus: "The court will not take anything by intendment in favor of alleged irregularities, but will presume that the proceedings of the inferior tribunal were regular unless the contrary appears from the record." The question raised by the said fourth exception was the correctness of the judgment below. That being so, the defendant, in appealing therefrom on exceptions, should have set forth, raised, and had determined each of the grounds or reasons for excepting to the judgment as contrary to law. The proceeding here raises the same question, to wit, that the judgment is contrary to law, but to sustain this position assigns an entirely different reason, one, which if correct, is apparent of record, viz., that the trial court made no decision in writing as required by said statute. The question of practice now arises as to whether the plaintiff in error may attack a judgment as contrary to law by exceptions on certain grounds, and after the exceptions are overruled, make the same attack by writ of error on other grounds apparent of record, and thus call on this court to review the case by piece-meal? To permit such practice would be unfair to the adverse party, who thereby incurs expense and delay; the infliction upon the court of unnecessary labor in reviewing causes; and the prolongation of litigation, all of

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which should be discouraged, rather than encouraged. This proceeding is not, as contended by the plaintiff in error, authorized by the rulings in *Notley v. Brown*, 17 Haw. 455, from which counsel quote as follows: "That being so, it would seem to follow that a party after pursuing one remedy to termination, namely, by exceptions, could not thereafter pursue the other remedy, namely, writ of error, to determine exactly the same questions." The writ here was sued out to determine one of the same questions determined on the exceptions, that is whether the judgment is contrary to law, assigning a ground not set forth in the exceptions. To permit it would be out of harmony with the rule laid down in *Notley v. Brown*.

Plaintiff in error contends that the statute requiring the trial court in a jury waived case to file a decision in writing giving the reasons therefor, is mandatory, and so held in *Kahai v. Yee Yap*, 20 Haw. 192, where the absence of such decision is held to be reversible error. Counsel then contends that the judgment is void because the trial court did not make such decision. We cannot agree with this contention. The failure of the trial court in a jury waived case to make the decision required by Act 117, Laws 1909, is reversible error by reason of which the judgment is voidable; but it is not void. "The issues raised by the pleadings, whether of law or fact, must be determined in favor of one party or the other before judgment can be entered. In other words, there must be either findings by the court or the verdict of a jury, and a judgment rendered without either verdict or findings is fatally erroneous, though not absolutely void." 11 Ency. Pl. & Pr. 864, 865. We hold that the plaintiff in error, for the reasons herein stated, is precluded from having the judgment reversed on the ground that there was no written decision stating the reasons therefor, and by his conduct has waived that objection.

The other errors assigned go to the regularity of the issuance by the clerk of a writ of execution and subsequently a writ of

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venditioni exponas under which the property levied upon under the said execution was sold by the sheriff. A writ of error does not lie to review ministerial acts subsequent to judgment, such as those named. This was the ruling in *Johnson v. Harvey*, 4 Mass. 483 and in *Hicks v. Murphy*, Walker (Miss.) 66, where it was held that the remedy was by *audita querela*. In the case of *Dumond v. Carpenter*, 3 Johns. 141, the court said: "If the judgment of the court below be correct and legal, no error will lie for any irregularity as to the execution." In 8 Ency. Pl. & Pr. 457, the rule is thus stated: "Irregularities in an execution do not affect the judgment upon which the writ issued, and are not reviewable on a writ of error." We do not pass upon the questions raised as to the regularity of the execution, *venditioni exponas* and sale.

Judgment affirmed.

E. Vincent and *E. Murphy* for plaintiff in error.

E. R. Bevins for defendants in error.

KAPOLUHI PALAU v. HELEMANO LAND COMPANY,
LIMITED, AND WILLIAH AHIA, TRUSTEE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 23, 1914.

DECIDED DECEMBER 9, 1914.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ASHFORD,
IN PLACE OF QUARLES, J.

EQUITY—interest of complainant in subject-matter—cancellation.

In order to maintain a suit in equity the complainant must have an interest in the subject-matter. In a suit to cancel two deeds, alleged to be forgeries, on the ground that they constitute clouds upon complainant's title, where it appeared that the complainant had no title to the land described in the deeds, the bill was properly dismissed.

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DEEDS—*forged deed void.*

A forged deed is void and passes no title. The fact of forgery may be shown at law as well as in equity.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Circuit Judge Ashford dissenting.)

This is an appeal from a decree of a circuit judge dismissing a bill of complaint in a suit in equity in which it was prayed that two certain deeds, namely, a deed dated December 29, 1900, conveying to one William Ahia, trustee, the land described in Grant No. 269, situate at Waialua, Island of Oahu, and purporting to have been executed by the complainant, the other being dated January 9, 1901, conveying the same land to one John Keahipaka, trustee, and purporting to have been executed by the said William Ahia, trustee, be decreed to be fraudulent and void, and that the same be cancelled. There was also a prayer that the defendants be adjudged and decreed to have no interest in said land. The bill averred that the complainant is the owner of the land in question and entitled to the possession of the same; that she inherited the same; that the said deeds are forgeries, the first never having been executed by the complainant, nor the second by the said William Ahia; that said deeds were made, and recorded in the registry of conveyances at Honolulu, by someone unknown to the complainant, for the wrongful and fraudulent purpose of defrauding the complainant of her interest in said land; that the defendant, Helemano Land Company, Limited, claims to be the owner of said land through mesne conveyances from the said John Keahipaka, trustee, and one John Emmeluth; and that the said purported deeds above mentioned constitute clouds upon the complainant's title in and to said land. The defendant, Ahia, in his answer, disclaimed all and any interest in the land in question, and averred that he knew nothing whatever of the execution of either of said deeds; and never paid or received any consideration in connection therewith. The Helemano

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Land Company, in its answer, denied the alleged ownership and right to possession of the complainant; denied the alleged forgeries, and averred that the deeds in question were executed by the complainant and Ahia, respectively, as they purport to have been executed, and with knowledge of their contents; denied the alleged fraudulent intent; and admitted that it claims to be the owner of any interest which the complainant may have had at any time in said land through the said deeds, but averred that it is advised that the true title to said land is in the Waialua Agricultural Company, Limited.

At the hearing the testimony was conflicting as to whether the deeds in question had been executed by the complainant and Ahia, respectively. The circuit judge, over the complainant's objection, admitted in evidence a deed of the land from the original owner, Kainalu, through whom the complainant claims title, undated, but acknowledged on the 24th day of October, 1870, to one Mahuka, and mesne conveyances by which, it was claimed the title passed to the Waialua Agricultural Company. The circuit judge did not pass upon the questions of fact involved in the allegations and denials that the deeds in question are forgeries, but dismissed the bill on the ground that the complainant's ancestor having, in his life time, sold and conveyed the land, the complainant did not inherit title to it, and, hence, has no interest in the subject-matter of the suit.

Counsel for the complainant contends that it was error to admit in evidence the deed of Kainalu, the ruling being "based upon the idea that the court had jurisdiction to pass on the legal title" to the land. It would seem, however, from the averment of title in the bill, that counsel for the complainant considered it material to show title, and if the averment was material, it having been denied, it was for the complainant to prove it. At the hearing, testimony, evidently for the purpose of proving title, was introduced tending to show that the complainant was the heir of Kainalu. We think the averment of title was material and that the complainant failed to sustain it.

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This involved the legal title only in so far as it went to the interest or lack of interest of the complainant in the subject-matter. On that point the deed of Kainalu was admissible. In order to sustain the averment that the deeds constituted clouds upon the complainant's title, it became necessary for the complainant to show that she had the title.

It is laid down as an elementary proposition that in order to maintain a suit in equity the complainant must have an interest in the subject-matter, and that a bill is demurrable which fails to show such interest. Story, Eq. Pl. (10 ed.) Sec. 508; *Selz v. Unna*, 6 Wall. 327, 334; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 285. In *Howe v. Duppa*, 1 V. & B. 511, 35 Eng. Rep. (Reprint) 199, the plaintiff, as executor of one Duppa, filed a bill for the purpose of having set aside an agreement and conveyances in pursuance thereof made by the decedent to his son, the defendant, on the ground of fraud. There was a plea the substance of which was that the decedent, who had owned a contingent interest in certain property, had parted with such ownership prior to the date of the execution of the conveyances which it was sought to have cancelled. The plea was sustained, the court saying, "the decisive answer to this bill is, that the fact was mistaken; at the date of those deeds he had no interest whatsoever in the property; having eleven years before by the former deed parted with all his interest; a fact which remaining unimpeached destroys the whole foundation of this bill which proceeds upon a supposed interest in him in 1791." In *Barr v. Clayton*, 29 W. Va. 256, a suit to set aside a tax deed, it appeared that the ancestor, through whom the plaintiffs claimed title, had, in her life time, sold and conveyed the land to one Taggart. A decree dismissing the bill was affirmed. The court said, "It is equally well settled that the plaintiff cannot maintain his suit unless he both avers and establishes by proof where the averment is denied, that he has an interest in the subject-matter of the suit, or right to the thing demanded, and a proper title to institute the suit. These are

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essential to sustain his right to any relief." The subject-matter of a cause "is the right which one party claims as against the other, and demands the judgment of the court upon." *Jacobson v. Miller*, 41 Mich. 90, 93; *Reed v. Muscatine*, 104 Ia. 183. See also 37 Cyc. 342; *Coleman v. Chauncey*, 7 Rob. (N. Y.) 578, 579; *McAndrews v. Chicago etc. R. Co.*, 162 Fed. 856, 858; *Jackson v. Smith*, 120 Ind. 520, 523. In the case at bar the subject-matter is the title to the land, to remove the alleged clouds from which this bill was filed. The undisputed evidence in the record shows that the complainant has no interest in the title.

The circuit judge did not undertake to pass upon the title to the land further than to determine that the complainant had no interest in the subject-matter. The bill was not dismissed on the ground that the title was in the Waialua Agricultural Company, but because the complainant did not inherit the title from Kainalu as claimed. The admission in evidence of the mesne conveyances to the Waialua Agricultural Company was, therefore, harmless error. Counsel for the complainant correctly contends that the title should be tried at law, but he is mistaken in assuming that the complainant is unable to proceed at law unless the deeds in question be first cancelled. The complainant being out of possession is in position to, at any time, bring an action of ejectment and therein litigate the title to the land, including the question of the alleged forgery. A forged deed is void and passes no title. *Reck v. Clapp*, 98 Pa. St. 581, 585; *Sapp v. Cline* (Ga.) 62 S. E. 529, 532; *Haight v. Vallet*, 89 Cal. 245; *Meley v. Collins*, 41 Cal. 663. The fact of forgery may be shown at law, in ejectment, as well as in equity, in a suit for cancellation. *Patton v. Fox*, 169 Mo. 97, 105; *Martin v. Harvey*, 89 Neb. 173; *Moore v. Munn*, 69 Ill. 591, 595. See also *McCandless v. Honolulu Plant. Co.*, 19 Haw. 239; *Ah Hoy v. Raymond*, 19 Haw. 568, 573. The dictum expressed by Mr. Justice Hartwell in *Manuel v. Pelani*, 6 Haw. 97, that at law evidence tending to defeat a sealed instrument

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is not admissible, has not been followed. We have been referred to no case, and have found none, where the facts were anything like those in the case at bar where cancellation has been decreed. *Kuamu v. Kaeleu*, 4 Haw. 136, and *Bunce v. Gallagher*, 4 Fed. Cas. No. 2133, cited by the complainant, are not in point. In each of those cases the complainant owned the title alleged to be clouded by the fraudulent deed. In *Kapiolani v. Mahelona*, 9 Haw. 676, the plaintiff was in possession, and her interest in the subject-matter was not disputed.

It has been suggested that as the purported deed of the complainant contains a covenant of warranty she would be entitled, if it be a forged deed, to have it cancelled even though she has no title in the land. But this was not the theory upon which the case was instituted, nor was it so tried in the court below or presented in this court. There are no averments in the bill that any injury is threatened in that regard. It is contended by counsel for the Helemano Land Company that the covenant of warranty was broken as soon as it was made as neither of the parties to the deed was in possession of the land, it being in the adverse possession of a third party; and that the statute of limitations has run against an action for damages for breach of the warranty. We believe we would not be justified, upon the record as it stands, in passing upon this aspect of the case. We are of the opinion, however, that as the question of the alleged forgery of the two deeds mentioned in the bill has not been determined, and as the question just referred to is to remain open, the dismissal of the bill should be without prejudice.

The decree appealed from is reversed and the cause is remanded to the circuit judge with direction to enter a decree dismissing the bill without prejudice.

Lorrin Andrews for complainant.

D. L. Withington (*Castle & Withington* on the brief) for the Helemano Land Co., Ltd.

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DISSENTING OPINION OF CIRCUIT JUDGE ASHFORD.

I find myself unable to concur in the conclusion reached by the majority of the court herein, or in the reasoning upon which that conclusion rests. In particular, I dissent from the proposition, as expressed in the majority opinion, that "in the case at Bar, the subject-matter is the title to the land, to remove the alleged clouds from which this bill was filed."

It appears to me that the subject-matter of the suit consists of the two deeds alleged to have been forged, and that the title to the land is in nowise involved, because a court of equity has no jurisdiction to try legal titles to land. And yet, in spite of this entire lack of jurisdiction for that purpose, the trial of this suit before the circuit judge appears to have proceeded almost entirely upon the theory that he was trying, and was entitled to try, the legal title.

The bill of complaint alleges the forgery of plaintiff's name to a deed to one William Ahia, and the further forgery of said William Ahia's name to a second deed, to one John Keahipaka, and the recordation of said deeds in the territorial registry of deeds, by parties unknown to plaintiff. The deeds themselves were not produced upon the trial, and both the plaintiff and said William Ahia strenuously denied upon oath any knowledge of the execution or of the whereabouts, or of ever having seen either of said deeds.

It is true that the bill of complaint describes said deeds as constituting clouds upon the title to the land which they purport to convey, and of which, as she alleges, she is the owner. But even if we view this suit in the light of a suit to remove a cloud from title, that would not, in my opinion, change the subject-matter of the action by making the title, instead of the forged deeds, and the cancellation thereof, prayed for in the bill, the subject-matter.

It is true that in the opinions written in some of the cases cited in the briefs of counsel, there has been some loose language used which would support the postulate that the title to

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the land, instead of the forged deeds, should be considered the subject-matter of the suit. In only two such cases, I believe, are such expressions to be found. The first of these is *Howe v. Duppa*, 1 V. & B. 511, 35 Eng. Rep. (Reprint) 199. That case involved a point of chancery practice, as to whether the defendant might introduce a plea alleging that whatever title had been owned by Duppa, had been conveyed by him prior to the execution by him of the deed which his executor sought to have cancelled upon the ground that its execution was brought about by undue influence. The ruling was, that such plea might be filed. But I distinguish that case from the one at bar in this respect;—there, a suit was brought by the executor of Duppa to set aside a deed made by the latter in his lifetime, for the alleged reason that its execution had been fraudulently procured, and the question of warranty of title in nowise entered into that decision; whereas, in the case at bar the plaintiff sets forth that her own name has been forged to a deed which not only purports to convey, but also to warrant the title to the land therein described.

Of much the same character is the case of *Barr v. Clayton*, 29 W. Va. 256. In that case the heirs of a deceased person brought suit to cancel certain tax deeds, because of certain alleged irregularities in the proceedings which resulted in the execution of those deeds. The defendants replied that the plaintiffs had no interest in the land affected by the deeds, because the plaintiffs' ancestor had, during his lifetime, conveyed away his title therein. This West Virginia case may be readily distinguished from the case at bar, in that the plaintiffs therein were seeking no relief against the effect of a deed purporting to have been executed by them, or any of them, and especially in that the tax deeds which they sought to have cancelled did not purport to contain any warranty of title by them, or any of them. The plaintiffs in this West Virginia case obviously had no interest whatever in the cancellation of the tax deeds. With respect to those deeds, they stood in the same relation

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that any other citizen of the State might have stood, namely, as strangers not only to the title, but to the transaction involved.

The case at bar is peculiar in more than one respect. One of its remarkable features is, that the conveyance upon which the defendants solely rely as the foundation of a title in another than plaintiff, was apparently unknown to the plaintiff or her counsel at the time of commencing this suit, but, after the suit was commenced, it was resurrected from some undisclosed repository, and placed on record, some forty-four years after the date of its acknowledgment. It was a deed from the patentee of the land, one Kainalu, to one Mahuka, and from Mahuka, as attempted to be shown by the evidence, there was an unbroken chain of mesne conveyances to Waialua Agricultural Company, Limited, which corporation, at present claims title. The majority of the objections raised upon the trial by plaintiff's counsel were to the admission in evidence of this original deed from Kainalu, and of the successive deeds in the chain from him to the Waialua Company. These objections were based upon the ground that they were irrelevant, incompetent and immaterial in the trial of this cause, for the reason that the court, sitting in equity, had no jurisdiction to try the legal title to the land described in the deed alleged to have been forged. I feel that those objections were well founded, and should have been sustained, and that the action of the trial judge in admitting them was erroneous. It may here be noted, as another remarkable feature of this case and its trial, that the trial judge did not assume to pass upon the main question submitted to the court, namely, the forgery, or otherwise, of the deeds for whose cancellation the suit was brought. The trial judge appears to have proceeded upon the theory that he was there for the purpose of first trying out the legal title, as a means, apparently, of determining whether or not the plaintiff had any such interest therein as would entitle her to have the alleged forged deeds cancelled, if their forgery had been established. And, while speaking of "elemental propositions," as

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the majority of this court, in their opinion, have done, it may not be inappropriate, to here recite another such "elemental proposition," namely, that a court in equity, sitting without a jury, is destitute of authority to try and determine legal titles. And yet that is exactly what the trial judge did in this case, and it was upon that trial, and his conclusions therein, that he based his further conclusion that plaintiff was destitute of such interest in the land described in the deeds alleged to have been forged, as to entitle her to maintain a suit for their cancellation. As we all know, the plaintiff had a right to a jury trial upon the question of whether or not the title of the original patentee, Kainalu, had ever been conveyed by him.

I have been referred to no case, nor have I found any where a plaintiff has been denied the right to have cancelled, a deed to which his name had been forged, and which deed conveyed a covenant of warranty. The fact should not be overlooked that the covenant of warranty in the alleged forged deeds is a most substantial part thereof, and the fact, if it be a fact, that the statute of limitations has now run upon any claim for damages upon that warranty, does not, in my opinion, help the case in the least. Its effect is the same today that it was when the deed containing it was fabricated (if, in fact, it was a spurious deed, as to which fact, by the way, there has been no finding in this case). If this plaintiff should now acquire from Waialua Agricultural Company, Limited, its present holder, the title which, for the purposes of this argument, we may assume to have been conveyed by Kainalu to Mahuka, then, under a familiar principle of law, her title, so acquired, would immediately (by virtue of the warranty mentioned), inure to the benefit of the grantee named in the alleged forged deed, unless the latter shall be adjudged spurious, and cancelled.

To state such a possible condition appears to me to call for a remedy, and that remedy, in my judgment, consists in the right of the plaintiff to have the deed in question adjudged spurious, and have it cancelled, if she shall sustain her allegations

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as to its forged and fraudulent character. If it be replied to this, that there are no precedents for such a course, then, I respectfully submit, it is time to make a precedent. It appears to me absurd and preposterous that a forged deed, containing a warranty of title, and falsely purporting to have been executed by this plaintiff, should be permitted to stand untouched, despite her appeal to equity to have its forged and fraudulent character adjudicated, and to have it cancelled. I can see no equitable quality in the suggestion that the plaintiff has no interest in the cancellation of such a deed, unless she shall first prove to a court of equity, a fact into which it has no right to inquire, namely, that she is the owner of the legal title to the land described in the forged deed. But, in my opinion, we are not without respectable precedents for the judgment which I think should be rendered here. A very well considered case, in many respects similar to the one at bar, is *Bunce v. Gallagher*, 5 Blatchf. 481, 4 Fed. Cases, No. 2133, at pp. 660, 662.

I have carefully examined all the authorities cited in the majority opinion, and find no adequate support in them for the conclusions reached by the court. Upon the point of the subject-matter of the suit, in particular, I feel that the majority of the court have fallen into error. Some half dozen citations appear in the opinion to support the postulate therein announced that the title to the land described in the alleged forged deeds is the subject-matter of this suit. But, in my judgment, not one of those citations, nor any other case which I have found, supports that proposition. Starting with Judge Cooley's definition of the subject-matter of a suit, as expressed in *Jacobson v. Miller*, 41 Mich., 90, 93-94, we find it expressed as follows:

"The subject-matter involved in a litigation is the right which one party claims as against the other, and demands the judgment of the court upon."

Let me ask, what is this right, in the case at bar, unless it be the right to have the deeds which are alleged to have been forged, declared spurious, and their cancellation decreed? The

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plaintiff does not ask the court to adjudicate her title to the land described in those deeds, and the court, sitting in equity, would have no right to so adjudicate, even if so requested, and if so inclined.

Other citations of the majority opinion require but briefest mention.

Jackson v. Smith, 120 Ind. 520, 523, does not touch the subject here under discussion. This fact abundantly appears from the opening paragraph of the opinion in that case, which I quote as follows:

"This controversy arises out of the proceedings of the common council of the city of Kokomo ordering that walls be placed along the banks of a watercourse, which flows through the city and is part of its system of drainage, and directing an assessment upon private property to pay the expense of making the improvement. The appellant seeks to quiet her title and asserts that the proceedings were absolutely void."

Reed v. City of Muscatine, 104 Iowa 183, was an action at law for personal injuries sustained by plaintiff upon the city street, due, as alleged, to a defect therein for which defendant was responsible.

McAndrews v. Chicago L. S. & E. Ry. Co., 89 C. C. A. 586 (162 Fed. 856), was also a personal injury case, wherein the court defined the phrase "subject-matter of the action" in a personal injury suit, to be "the circumstances and facts out of which the action arises." Applied to the case at bar, this last-cited case is, in my judgment, a distinct authority for the plaintiff.

Coleman v. Chauncey, 7 Rob. (N. Y.) 578-9, was a claim for a percentage, (by way of costs,) upon the amount of money involved in a certain suit; but the court took occasion to define the phrase now under consideration, and did so as follows:

"The subject-matter involved is that which is to be directly affected by the action."

Again, regarding this case as an authority for the plaintiff, I would suggest that "that which is to be directly affected by

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the action" in the case at bar, consists of the alleged forged deeds, sought to be cancelled.

Two other cases remain to be noticed, which are cited to the point that a person having no interest in the subject-matter of the action will not be heard in equity. The first of these is *Selz v. Unna*, 6 Wall. 327, 18 Law Ed. 799. The point upon which the plaintiffs were there dismissed from court was that they were seeking to enforce against the defendant, an inequitable and dishonest agreement into which they had entered with him, in another suit, wherein the defendant had been plaintiff, and the plaintiffs, with another, had been defendants. The substance of the agreement was, that the plaintiffs in the latter suit, (defendants in the former,) should "lie down," and allow judgment to be taken against them and their co-defendant, and that the plaintiff in the former suit should then look only to the co-defendant referred to, (the proposed victim of the conspiracy,) for the recovery sought. I can find in the case last cited nothing whatever to support the conclusions of the majority of the court in the case at bar.

U. S. v. San Jacinto Tin Co., 125 U. S. 273, 31 Law Ed. 747, was a case where the defendants claimed that the United States had lent its name to the prosecution of a suit to revoke a land patent, not for its own benefit, but for the benefit of a third party, who alone, would profit thereby. The court held that such a suit could not be maintained in equity, but it also held that the United States had a real interest in the maintenance of the suit, although the defendants won upon the merits.

It has been with extreme reluctance that I have felt compelled to thus dissent from the views of the majority of the court, but, as I view the merits of this case, and the authorities to which we have been referred, as well as others which I have consulted, there is no other course open to me.

In my judgment the decree should be reversed, and the cause remanded for a finding upon the facts as to whether the deeds complained of were forged and spurious.

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J. M. CAMARA, ADMINISTRATOR OF THE ESTATE
OF CAROLINE PINHEIRO, DECEASED, v. SOCIE-
DADE LUSITANA BENEFICENTE DE HAWAII,
A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 9, 1914.

DECIDED DECEMBER 11, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

BENEFICIAL ASSOCIATION—scope of powers of.

An incorporated beneficial association is limited to the purposes or object expressed in its charter and when the charter of the association prescribes who shall be the beneficiary of a membership after the death of the member it is not in the power of the company or the member or of both to alter the rights of those who by the charter are declared to be the beneficiaries except in the mode and to the extent therein indicated.

SAME—by-law—when void.

A by-law which is inconsistent with the charter is unauthorized and void.

SAME—same—beneficiary of mortuary fund.

Where the charter expressly provides who shall be entitled to receive the mortuary fund after the death of a member the corporation cannot make a by-law extending or limiting the right thus regulated.

SAME—same.

The designation of a person not entitled to take under the charter of the society does not invalidate the contract but only the designation so that the benefit will go to the person rightfully entitled to take under the charter of the society.

OPINION OF THE COURT BY WATSON, J.

This is an action of assumpsit to recover the sum of \$1500 as a death benefit or donation alleged to have accrued to plaintiff's intestate as the widow of one Eduardo Pinheiro, who was at the time of his death a member in good standing of defendant, an incorporated mutual benefit society. The material facts are undisputed and are as follows: The member joined the society March 8, 1882, and died October 20, 1910; in 1909

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(By-Laws, Ch. 7) the amount of the death benefit was set at a fixed sum, viz., \$1500, to be taken from a special fund for the establishment of which monthly dues were to be paid by all members. There is no contract of insurance or death benefit certificate and the claim rests entirely upon the charter and by-laws of the society. The purpose of the society, as stated in its charter granted on the 17th day of January, 1887, and also in its amended charter granted on the 20th day of April, 1909, is the "*rendering aid and assistance to each other in case of sickness and to the families of such as might die.*" By Article 10 of chapter 7 of the by-laws of 1909 it is provided: "The member who has no family in the Territory of his residence, as designated in the above article, and who does not have himself any means of subsistence, shall have the right to leave, after his death, all the donation or part of it to any person or persons who shall have taken proper care of him or who shall have helped him or who shall have provided for his subsistence or for his treatment during his sickness." Eduardo Pinheiro before his death executed the following instrument duly presented to the defendant:

"To the President and Board of Directors of Sociedade Lusitana Beneficente de Hawaii:

"Whereas Eduardo Pinheiro, a resident of Honolulu, County of Oahu, Territory of Hawaii, is advanced in age, in poor bodily health and unable to perform any manual labor wherewith to pay for his proper maintenance and other necessary expenses, and

"Whereas, the said Eduardo Pinheiro is without any immediate family living within the Territory of Hawaii to care and maintain him, and

"Whereas the said Eduardo Pinheiro is, at the present time, a member in good standing of the Sociedade Lusitana Beneficente de Hawaii, a corporation organized and existing under the laws of the said Territory of Hawaii, and

"Whereas the by-laws of said Sociedade Lusitana Beneficente de Hawaii require the payment of certain dues and assessments from time to time by the said Eduardo Pinheiro in order

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to keep and maintain himself in proper standing and in order to be entitled to give and dispose of such donations or benefits as the said by-laws prescribe at his decease, and

"Whereas the said Eduardo Pinheiro is financially unable to pay any further dues or assessments as aforesaid or to properly care for and maintain himself, and

"Whereas Jose Ferreira Durao, residing at City of Honolulu aforesaid, has promised and agreed to pay all such dues and assessments due since January 28th, 1908, or which may hereafter become due and owing by said Eduardo Pinheiro to said Sociedade Lusitana Beneficente de Hawaii under its by-laws, and to provide for and maintain the said Eduardo Pinheiro during the balance of his term of his natural life, and

"Whereas the said Eduardo Pinheiro is desirous of giving and disposing of any and all donations or benefits to the said Jose Ferreira Durao which may be given or disposed of by the by-laws of said Sociedade Lusitana Beneficente de Hawaii;

"Now Therefore, I, the undersigned, Eduardo Pinheiro, member number 233 of the Sociedade Lusitana Beneficente de Hawaii, in conformity with conditions of Article X of Chapter VII of the actual statutes in power, to declare that I am of sound and disposing mind and memory and it is my free wish and desire that the donation, which Article III of Chapter VII refers to, be, after my death, and I do hereby order the officers of the said Sociedade Lusitana Beneficente de Hawaii to pay the said donation in total to my beloved friend, Jose Ferreira Durao of Honolulu, Island of Oahu, Territory of Hawaii, or his heirs, at my decease in recompense for my maintenance and many other expenses done by me and paid by the said Jose Ferreira Durao and for services rendered to me in life.

"Dated at Honolulu, Oahu, September 16, 1909.

"Eduardo Pinheiro his
 X
 mark.

"In the presence of:

"Camillo Pereira

"F. Pacheco

"J. P. Rodrigues"

None of the facts stated in this document are controverted. Eduardo Pinheiro resided in Honolulu, his wife at Funchal, in the Madeira Islands. This separation was entirely without

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fault of the wife. Joseph Durao is not related to the deceased either by consanguinity or affinity and was not shown to be a member of his household. The defendant claims that under its by-laws and the above instrument it is legally bound to pay the \$1500 death benefit to Durao and not to plaintiff. Plaintiff contends that the by-law (Art. 10, *supra*) is not within the powers of the society to enact and is therefore *ultra vires* and void and that plaintiff's intestate, in the absence of a legal nomination, was the beneficiary under the by-laws of the society. It is conceded by defendant's counsel that if this point be well taken plaintiff is entitled to recover in this action, the widow under the by-laws being the person entitled to recover the death benefit of \$1500, in the event there is no other valid disposition thereof by the member.

The only question presented to the trial court was whether under a proper construction of the charter and by-laws of the defendant society Eduardo Pinheiro could designate a stranger (Durao) as beneficiary to the exclusion of the widow (plaintiff's intestate). The evidence is undisputed that Durao cared for the deceased and incurred debts to the extent of \$600 for his maintenance. The case was tried in the circuit court, jury waived, and from a decision and judgment in defendant's favor plaintiff brings the case to this court on exceptions.

Certain principles touching the management and control of incorporated benefit societies and the payment of benefits growing out of the death of a member, seem to be well settled by the authorities. Among others the following may be stated:

When the charter of the society prescribes who shall be the beneficiary of a membership after the death of the member it is not in the power of the company or the member or of both to alter the rights of those who by the charter are declared to be the beneficiaries except in the mode and to the extent therein indicated. *Kentucky Ins. Co. v. Miller's Administrator*, 13 Bush. 489; *Amer. Legion of Honor v. Perry*, 140 Mass. 589; *Presbyterian M. A. Fund v. Allen*, 106 Ind. 593; 2 A. & E.

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Ency. Law. (1st ed.) 177; 1 Bacon, *Benefit Societies and Life Insurance*, §168; *Old People's Home Society v. Wilson*, 176 Ill. 94.

The by-laws must be consistent with charter. 1 Bacon, *Ben. Soc.*, §83; 3 Clark and Marshall on *Private Corporations*, p. 1941; 3 A. & E. Ency. Law (2d ed.) 1062; 5 A. & E. Ency. Law (2d ed.) 95; and a by-law which is inconsistent therewith is utterly void. *Presbyterian M. A. F. v. Allen*, supra; *Hicks v. Perry*, 140 Mass. 580; *Cerny v. Cesky Dam*, 146 Ill. App. 518.

In the case at bar the purposes for which the society was formed are strictly limited by charter (1st) to rendering aid and assistance to the members in case of sickness, and (2d) to rendering aid and assistance to the families of such as may die. The by-laws of the society from the time of its organization have recognized and made provision for two forms or classes of benefits in accordance with charter provisions,—sick benefits, known as soccoros, and death benefits, known as donativos, and the undisputed evidence shows that for a period of more than one year prior to the death of Eduardo Pinheiro he was in receipt of a sick benefit or invalid pension of \$10.50 per month from the society. From this sum was deducted his dues and assessments amounting to \$2.50 and sometimes \$3 a month, and the balance was paid to the deceased member. Under the by-laws of the society (Art. 15, Ch. 7, By-Laws of 1909) the death benefit is to be paid by the society within ninety days after the receipt by it of official notification of the member's death accompanied by due proofs, etc. The charter of the society contemplates assistance to the member during his life and the payment after the death of the member of a benefit fund to the member of the family entitled thereto under the rules of the society—in this case (in the event the designation of Durao was invalid) concededly the widow. It is admitted that Durao, who claims the fund, is not a member of the family of the deceased. But it is contended by counsel for defendant that as the society was

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organized, among other purposes, for "rendering aid and assistance to each other," the assured member had the right in his lifetime and for his own "aid and assistance" to make such use or disposition of the benefit by hypothecation, by power of appointment or otherwise, as would best yield such result. In this view we cannot concur. The fund is no part of the estate of the deceased but belongs wholly to the lawful beneficiary. *Monizi v. Santo Antonio Society*, 21 Haw. 591, 594; *Voelker v. Grand Lodge B. of L. F.*, 77 S. W. 999, 1000. We think it is plain that an undertaking to pay a given sum of money after the death of the member is not intended as aid or assistance to the member. It was obviously intended under the provisions of the charter as aid and assistance to the family of the member who dies. *Rockhold v. Canton M. B. Society*, 129 Ill. 440, 456, 2 L. R. A. 420. In *National Mutual Aid Association v. Gonser*, 43 Ohio St. 1, the court, in discussing a contention there advanced by plaintiff's counsel, in all respects similar to that advanced by defendant in this case, said, (page 6):

"It is further maintained by Gonser that as this company was organized, among other objects, for the 'mutual protection and relief of its members,' the assured member had the right, in his life-time, and for his own 'protection and relief,' to make such use or disposition of the policy, either by hypothecation, by assignment, or by will, as would best yield such result. This argument involves the presupposition that Wilhelm Kebaugh, the assured member, is the party for whose benefit the policy was issued. It is in no sense an endowment policy. True, it is in terms made payable 'to Wilhelm Kebaugh, or any person designated,' etc., but it is expressly made payable 'within ninety days after due notice and proof of' his death. It is clear that this policy contemplated that its benefits were destined to accrue to the person designated by the will of the assured, or to his heirs, if no such designation were made. It follows that, to entitle himself to recover upon this policy, Gonser must bring himself within the operation of the second declared purpose of the statute, to wit: 'for the payment of stipulated sums of money to the families or heirs of the deceased members of such

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company.' Gonser's petition fails to bring him within either designation."

The charter of the society intends a particular and special method of assistance to the designated class of persons after the member's death and the purpose would be defeated by allowing an assignment during the member's life to his creditors as collateral security. Durao was nothing more than a creditor of the deceased so far as the law of this case goes and the assignment to him was therefore invalid. 1 Bacon, Ben. Soc., §§244, 244a; *Wagner v. Ben. Soc.*, 70 Mo. App. 167; *Voelker v. Grand Lodge B. of L. F.*, supra. The by-law (Art. 10, Ch. 7, By-Laws of 1909) under which the deceased member attempted to dispose of the mortuary fund to Durao is contrary to the defendant's charter and therefore unauthorized and void. It was conceded by the defendant, and found as a fact by the trial judge, that the absence of the member's wife from the Territory was entirely without fault on her part. There is nothing in the charter provision limiting the payment of this mortuary fund to members of the family of the deceased who are resident in this Territory and we do not think such limitation could be properly imposed by the corporation in the form of a by-law. Where the charter expressly provides who shall be entitled to receive the mortuary fund the corporation cannot make a by-law extending or limiting the right thus regulated. 3 Clark and Marshall on Private Corporations, pp. 1945-46; *People's H. S. Bank v. Superior Court*, 104 Cal. 649. We are therefore of the opinion that any by-law permitting a member to deprive his widow of the mortuary fund under such circumstances would be an unreasonable and an unwarrantable limitation upon the charter provision and void. "The designation of a person not entitled to take under the laws of the society or its charter does not invalidate the contract but only the designation so that the benefit will go * * * as the laws of the society provide in case of the death of all the beneficiaries." 1 Bacon, Ben. Soc., §265, and cases cited.

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The exceptions are sustained and the judgment is vacated.
Holmes, Stanley & Olson for plaintiff.
E. C. Peters for defendant.

CHING ON v. D. H. LEWIS.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED DECEMBER 8, 1914.

DECIDED DECEMBER 12, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

HUSBAND AND WIFE—*necessaries*—*legal services*.

A complaint in assumpsit for legal services rendered by an attorney at the request of a married woman in procuring warrants of arrest against her husband upon charges of assault and battery, in the absence of allegations to the effect that the public officials whose duty it is to issue warrants and prosecute offenses had refused to act, and that the accusations were well founded, and that the services rendered were necessities, does not set forth a cause of action against the husband.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiff appeals from a decision of the district magistrate sustaining a general demurrer to the complaint in an action of assumpsit. Plaintiff is the assignee of J. A. Magoon, a member of the bar of this court. It was alleged in the complaint:

"That said defendant is indebted to said plaintiff in the sum of Fifty Dollars for service rendered in the matter of an assault and battery alleged by said Susan K. Lewis to have been on to wit: December 26, 1913, committed upon her by said defendant, and in the matter of an alleged attempt of said defendant in connection with said assault to drive her away from his home where she was then residing with him as his wife and leaving her homeless and in a destitute condition.

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"That said defendant is further indebted to said plaintiff in the sum of One Hundred Dollars for services rendered in the matter of an assault and battery alleged by said Susan K. Lewis to have been, on to wit: May 26, 1914, committed upon her by said defendant by striking her with a bottle filled with liquid and injuring her, and at the same time threatening to kill her, in consequence whereof she claimed that she was in great fear that said defendant would kill her, and for services rendered in the matter of an alleged attempt in connection with said last mentioned assault, on the part of said defendant to drive said Susan K. Lewis away from her said home and leaving her homeless and in a destitute condition; and for services rendered in the matter of an assault and battery alleged by said Susan K. Lewis to have been on, to wit: May 27, 1914, committed upon her by said defendant and one M. Heffern, at which time both said defendant and said M. Heffern, were trying to drive her away and prevent her from entering into in her said home; and for services rendered in the matter of securing a special policeman to guard said Susan K. Lewis against assault from said defendant and said M. Heffern.

"That said Susan K. Lewis promised for and on behalf of said defendant to pay said Magoon for his services in the premises such sum as said services were reasonably worth and that said services were reasonably worth the sum of \$150.00.

"That said defendant is indebted to said plaintiff in the further sum of \$5.00 for money paid by said Magoon to said special policeman for his services as aforesaid at the special instance and request of said Susan K. Lewis and upon her promise for and on behalf of said defendant to repay the same to the said Magoon."

The contention of counsel for the plaintiff is that the services rendered and cash advanced were "necessaries" for which the husband is liable. *Morris v. Palmer*, 39 N. H. 123, is cited. In that case the wife employed an attorney to make out a complaint and cause the arrest of her husband for a breach of the peace, and such proceedings were had thereon that he was committed to the county jail. It was held that the services were necessities furnished to the wife for her protection, and that the husband was liable to the attorney for the amount of his

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fee, and money advanced for costs. The court pointed out that "By the statute, the complainant is liable for the costs in the first instance, unless the prosecution is ordered by the counsel for the State. The counsel for the State seldom if ever interfere to order a complaint for a breach of the peace, and no one is required to make out such a complaint, on which a warrant issues, without compensation." In *Smith v. Davis*, 45 N. H. 566, under somewhat different circumstances, it was held that an attorney's fee was not recoverable, it not appearing that the services were necessary or that there were reasonable grounds for instituting the proceedings. In *Conant v. Burnham*, 133 Mass. 503, in holding a husband liable for legal services rendered to his wife in successfully defending her against a complaint instituted against her by him for being a common drunkard, the court said, on the subject of necessities, "Each case must be determined by its own circumstances. Approximations may sometimes be made, by holding that certain articles or services are to be deemed outside of any reasonable construction of the term. But legal services do not fall within such universal or general exclusion. There may be occasions when such services are absolutely essential for the relief of a wife's physical or mental distress." And in holding a husband not liable for legal services rendered his wife in instituting a complaint against him for an assault and battery upon her, the court said, "Under the laws and customs of this State, we do not think that legal assistance was necessary for this woman in prosecuting her husband for an assault and battery upon her. The complaint in such case may be made orally to the magistrate, who will himself reduce it to writing, issue a warrant if it appears that an offense has been committed, and investigate the case." See also *McQuhae v. Rey*, 23 N. Y. S. 16. In this Territory it is the duty of the district magistrate to take the complaint of any person alleging the commission of any offense, or that another intends to commit an offense with violence, and to issue a warrant for the arrest of the accused, and public prosecutors

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are provided whose duty it is to conduct on behalf of the people the prosecution of such charges. It appears, therefore, that, unless the public officers refuse to act, the employment of private counsel to obtain a warrant of arrest and to prosecute a charge of assault or to secure a peace bond is not necessary. No allegation to the effect that the officers refused to act was made in the complaint in this case. The view here taken is in harmony with the cases of *Kekoa v. Borden*, 5 Haw. 23, and *Vivas v. Kauhimahu*, 19 Haw. 463.

Furthermore, there was no allegation that an assault and battery was in fact committed, but merely that the wife so alleged, and there was nothing to show that the charge was well founded. There was no allegation that the services rendered or money advanced were necessities, nor were facts set forth from which it could be inferred that they were necessities. There was an allegation to the effect that the wife was impecunious and unable to pay the attorney, but that alone was not enough. The magistrate was right in holding that the complaint did not state a cause of action against the defendant.

Judgment affirmed.

J. A. Magoon for plaintiff.

Lorrin Andrews for defendant.

In re Sherwood, 22 Haw. 381.

IN THE MATTER OF THE APPLICATION OF DAVID
K. SHERWOOD, HARRY H. HOLT AND CHARLES
P. OSBORNE FOR A WRIT OF MANDAMUS
AGAINST DAVID KALAUOKALANI, JR., CLERK
OF THE CITY AND COUNTY OF HONOLULU.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 2, 1914.

DECIDED DECEMBER 14, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

MANDAMUS—*sufficiency of writ—demurrer—quo warranto.*

Where it appears from the recital of facts in an alternative writ of mandamus that the object of the proceeding is to determine the title of one, holding a certificate of election, to an office, a demurrer on the ground that the writ does not state facts sufficient to constitute a cause of action or entitle the petitioners to the writ demanded, will be sustained; it appearing from the petition that *quo warranto* is the proper remedy.

SAME—*purpose of writ.*

The writ of mandamus lies to compel action where the law imposes a duty to act, and there is a refusal to act, but not to negative or prevent action.

OPINION OF THE COURT BY QUARLES, J.

The petitioners, David K. Sherwood, Harry H. Holt and Charles P. Osborne, presented to the second judge of the first judicial circuit their petition for an alternative writ of mandamus directed to David Kalauokalani, Jr., city and county clerk of the city and county of Honolulu, whereupon an alternative writ of mandamus issued directed to the said David Kalauokalani, Jr., as city and county clerk, commanding him to appear and show cause why he issued to himself a certain certificate certifying that at the election held in said city and county on the 12th day of September, 1914, he received a majority of all of the registered voters voting at said election and was elected to the office of city and county clerk; why he should not deliver

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up said certificate of election to be cancelled; why he should not refrain from attempting to hold or attempting to usurp the said office under and by virtue of said certificate of election and otherwise from the first day of January, 1915; and that he should observe and obey such further order, judgment and decree as should be made by the said circuit judge upon a hearing of said alternative writ. The writ set forth certain facts, viz: That the petitioners are duly qualified electors of the city and county of Honolulu; that David Kalauokalani, Jr., as clerk of the city and county of Honolulu, has issued to himself a certificate certifying that he received a majority of the votes of the registered voters voting at the election held in said city and county on the 12th day of Septemebr, 1914, at which he was a duly nominated candidate for said office, and that he was elected to said office for the term of two years, to wit, from the first day of January, 1915, to the first day of January, 1917; that said David Kalauokalani, Jr., under the said certificate of election, intends to usurp the said office of city and county clerk, enter upon the duties thereof, and enjoy all the rights, privileges and emoluments of the said office of said city and county clerk; that said David Kalauokalani, Jr., issued to himself the said certificate of election by reason of having received 5289 votes at the primary election held in the city and county of Honolulu and in the several precincts thereof on the 12th day of September, 1914, under the provisions of Act 151, Session Laws of 1913; that it manifestly appears that the said act is beyond the powers of the legislature of the Territory of Hawaii to enact and that the said election was illegal and void, the said certificate of election was illegally issued, and is now illegally held by the said David Kalauokalani, Jr.

To the alternative writ the respondent, David Kalauokalani, Jr., filed a demurrer setting forth several grounds, to wit: 1. That the writ does not state sufficient facts to constitute a cause of action or to entitle the petitioners to the writ demanded. 2. That petitioners have no legal capacity to sue and the

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proceeding should be in the name of the Territory on relation of the petitioners. 3. That petitioners have no such interest in the issuance of said certificate of election as to entitle them to bring this proceeding. 4. That the said writ does not command the doing of a duty imposed upon the respondent by law. 5. That said petitioners have other and adequate remedies. 6. That no demand to deliver up the said certificate for cancellation was made upon the respondent. 7. That the writ is ambiguous, uncertain and unintelligible in that it does not show in what respect Act 151, Session Laws 1913, is beyond the power of the legislature to enact.

The circuit judge reserved to this court, on the record, the following questions, to wit: 1. "Shall the demurrer be sustained on the grounds submitted?" 2. "Is Act 151 S. L. 1913 constitutional?" 3. "Is Act 151 S. L. 1913 in contravention of the Organic Act of Hawaii?" 4. "Is Act 151 S. L. 1913 ultra vires of the Legislature of the Territory of Hawaii?"

It is our opinion and we so hold, that the demurrer to the alternative writ should be sustained. The writ of mandamus is the proper remedy to compel an individual, corporation or judicial officer or tribunal to perform a certain act which the law enjoins upon him, or it, and performance thereof is refused. (Sec. 2010 R. L.; *Hipa v. Luce*, 5 Haw. 520; *Treasurer v. Benson, Smith & Co.*, 18 Haw. 76; *McCandless v. Campbell*, 20 Haw. 411.) It will not lie where there is a speedy remedy at law by which adequate relief may be obtained unless there is a showing that the public good and the administration of justice would otherwise suffer. (Sec. 2011 R. L.; *Peacock v. Collector of Customs*, 8 Haw. 531.) Mandamus is not the proper remedy to try the title to an office, the law having provided a speedy and adequate remedy by *quo warranto*. (Sec. 2044 R. L. as amended by Act 39 S. L. 1907; *Kanealii v. Hardy*, 17 Haw. 1, 9; *People v. Olds*, 3 Cal. 167; *Henry v. Camden*, 42 N. J. L. 335; *Duane v. McDonald*, 41 Conn. 517; *People v. Matteson*, 17 Ill. 167; *St. Louis v. Sparks*, 10 Mo.

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117; 13 Ency. Pl. & Pr. 493.) Our election laws make it the duty of the respondent to issue certificates of election to candidates for office when the returns from an election show that the party to whom the certificate is to issue has received the requisite vote at an election to entitle him thereto. We know of no law in this jurisdiction making it the duty of the respondent, or of any one holding a similar office, to cancel or to deliver up for cancellation a certificate that has been issued. The purpose of the writ is to compel action where the law imposes a duty to act and there is a refusal to act; it is not its function to negative or prevent action. (13 Ency. Pl. & Pr. 500; *Maxwell v. Burton*, 2 Utah 595.) It is obvious that this proceeding was instituted to test the validity of the alleged election of the respondent at the primary election held on the 12th day of September, 1914, and his title to the office of clerk of the city and county of Honolulu for the term commencing January, 1915. For the reasons heretofore stated the demurrer to the alternative writ must be sustained on the first, fourth and fifth grounds herein stated. It is not necessary to pass upon the other grounds of the demurrer.

For the reasons herein stated the first reserved question is answered in the affirmative. It is unnecessary to answer the other reserved questions, the affirmative answer to the first one being decisive of the proceeding.

G. A. Davis for petitioners.

I. M. Stainback, Attorney General, and *J. W. Cathcart*, City and County Attorney, for respondent.

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IN THE MATTER OF THE APPLICATION OF DAVID
K. SHERWOOD, HARRY H. HOLT AND CHARLES
P. OSBORNE FOR A WRIT OF QUO WARRANTO
AGAINST DAVID KALAUOKALANI, JR., CLERK
OF THE CITY AND COUNTY OF HONOLULU.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 2, 1914.

DECIDED DECEMBER 14, 1914.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

QUO WARRANTO—*demurrer to petition—occupation and user of office.*

A demurrer to a petition for a writ of quo warranto which recites facts showing that respondent claims to have been elected to an office for a term commencing in the future, and intends to occupy and use such office at a future time, should be sustained, the proceeding being premature.

SAME—*parties to the proceeding.*

Persons who are registered voters in the district where an election is held, and tax payers, are proper parties to apply, by petition, for a writ of quo warranto.

QUO WARRANTO—*practice—demurrer—amendment.*

In the proceeding under the Hawaiian statutes which is in the nature of quo warranto the writ or order is like a summons commanding the respondent to show by what authority he claims to hold an office, and is, in effect, an order to show cause; the sufficiency of the facts is tested by demurrer to the petition, which, if sustained, the writ fails unless the petitioner can amend, the petition being amendable.

APPEAL AND ERROR—*generality of reserved question.*

A question reserved to the supreme court should point to some rule of law the application of which, under the issues of law or fact, is, in the opinion of the trial court or judge, doubtful.

OPINION OF THE COURT BY QUARLES, J.

This is a proceeding by *quo warranto* to test the right and title of the respondent, David Kalauokalani, Jr., to the office of city and county clerk of the city and county of Honolulu, for the term commencing January, 1915, and ending January, 1917, and the right of the respondent to issue to himself a cer-

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tificate of election to said office for said term. The facts alleged in the petition for the writ are the same as stated in the alternative writ of mandamus between the same parties just decided (ante page 381). The writ commanded the respondent to appear at a certain time and place and answer unto the petitioners, and their petition, and show why he, the respondent, as clerk of the city and county of Honolulu, issued to himself a certificate of election as clerk of the city and county of Honolulu for the term commencing January, 1915, and ending January, 1917, and to show by what warrant and authority he intends to claim, hold, use, enjoy and exercise the said office for said term and period, and to abide the order, judgment or decree to be made in the premises.

The respondent filed his demurrer to the petition for the writ, upon the following grounds, to wit: 1. That the petition does not state facts sufficient to constitute a cause of action or to entitle petitioners to relief by writ of *quo warranto*. 2. That the petition does not show that respondent is in possession of the office of city and county clerk but alleges that respondent intends to usurp said office for the term commencing January, 1915. 3. That the petition shows that petitioners have no legal capacity to sue in that the proceeding is not maintainable in the name of private parties, but only in the name of the Territory. 4. That it does not appear from the petition that the petitioners have any interests that entitle them to bring these proceedings. 5. That *quo warranto* is not the proper legal proceeding to test the right of respondent to issue said certificate or to test the extent of his authority. 6. That no proper or legal judgment could be entered against the respondent in this proceeding. 7. That the petition is uncertain, unintelligible and ambiguous in that it cannot be told therefrom how or why Act 151 S. L. 1913 is beyond the power of the legislature to enact.

The proceedings come here upon four questions reserved by the circuit judge to this court, the questions being identical with

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those reserved in the mandamus proceeding just determined between the same parties (ante page 381).

The petition alleges that the petitioners are tax payers and registered voters of the city and county of Honolulu; that at the primary election held in said city and county on the 12th day of September, 1914, the respondent received 5289 votes as a candidate for the office of city and county clerk of the city and county of Honolulu; that respondent claims his election to said office for the term commencing January, 1915; that he has issued to himself a certificate of election to said office for said term, and intends to, and will, usurp and occupy said office during such term. Act 151, Laws 1913, providing for a primary election, and the proviso to section 16 of said Act, declaring that a candidate for an office receiving a majority of all the votes of the registered voters voting of the district in which he is a candidate is thereby elected, is, by divers allegations in the petition, attacked as contravening the Organic Act of the Territory of Hawaii, unconstitutional and void.

Section 2046 R. L. provides that the order or writ of *quo warranto* "is obtained by petition addressed to a circuit judge setting out facts sufficient to show a right to the order, and sworn to if the application is made by a private individual." Under this statutory provision the petition must state facts sufficient to authorize the order or writ. In this case the petition states facts which affirmatively show that the order or writ should not issue, in that it appears therefrom that the respondent claims title to an office for a term to commence in January, 1915, and shows that he was not in possession of such office under such claim at the time of the application for the order or writ. The petition is, therefore, insufficient to authorize the issuance of the order or writ. "*Quo warranto*, or a proceeding in the nature thereof, lies only against one who is in the possession and user of the office, and not against one who merely lays claim to the office, or who has never been admitted thereto." 17 Ency. Pl. & Pr. 407, and authorities cited in note 2. See

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also High Ext. Leg. Rem. (2 ed.) §627. *Quo warranto* is the proper remedy to test the title to an office, but the application for the order or writ in this proceeding is premature. The third and fourth grounds of the demurrer are that the petitioners have no legal capacity to sue, that the proceeding must be in the name of the Territory, and that the petition does not show that petitioners have any interest in the proceedings that will enable them to institute the same. The petitioners, as tax payers and registered voters of the city and county of Honolulu, have the right to participate in the selection of city and county officers, are required to contribute to the public revenues out of which the salaries of such officers are paid, are interested in having duly elected officers in the various elective offices, and are therefore interested in the inquiry raised by this proceeding. The ancient writ of *quo warranto* as known to the common law has been obsolete in England for centuries, informations in the nature of *quo warranto* having been substituted therefor (32 Cyc. 1413). The doctrine that the usurpation of a public office is a public wrong and that the remedy is a public one to be sought only in the name of the sovereign has been relaxed by statute in nearly, if not all, jurisdictions. (High on Ext. Leg. Rem., 2 ed., §697.) Our statutes do not expressly declare who shall, or who shall not, be parties to the proceeding. Section 2046 R. L. seems to show the intent to permit private individuals to institute the proceeding as it is there expressly provided that the petition for the order must be sworn to "if the application is made by a private individual." Our election laws provide for election contests by electors, and do not restrict such contests to competing candidates. Section 1574 R. L. relating to *quo warranto* as to the high sheriff and other police officers therein named provides that the proceeding may be instituted either by the attorney general in his official capacity or by "any private person having any interest in such inquiry." It thus appears to be the policy of our laws to permit either the attorney general, or any private person having any interest in

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the inquiry to institute the proceeding. The petition shows, *prima facie*, that the petitioners have such interest in the inquiry instituted by the proceeding as enables them to institute it. The demurrer of the respondent should be sustained on the first and second grounds, but not on the third and fourth grounds. It is unnecessary to pass on the other questions raised by the demurrer.

While we do not consider the second, third and fourth questions reserved, we deem it proper, in the interest of good practice, to suggest that these questions are too general to be entitled to consideration. A question reserved to this court should point to some rule of law the application of which, under the issues of law or fact, is, in the opinion of the trial court or judge, doubtful.

At the argument a question was raised as to the sufficiency of the writ in this case and we deem it best to refer briefly to the proper practice under our statutes. The proceeding is not the ancient writ of *quo warranto*, but a statutory proceeding in the nature of *quo warranto*. The petition must state facts sufficient to show that the petitioner is entitled to the writ or order. The writ or order need not recite the facts showing that the petitioner is entitled to it, and is in the nature of a summons commanding the respondent to show by what authority he claims to hold the office, and, in effect, is an order to show cause. The sufficiency of the petition may be tested by demurrer, which, if sustained, the writ fails unless the petitioner can amend and state sufficient facts to show that he is entitled to the writ or order, the petition being amendable in like manner as petitions in actions at law. In this proceeding the respondent properly demurred, upon specific grounds, to the petition, and not to the writ, the practice being unlike that in *mandamus*, where, as held in *Bradley v. Thurston*, 7 Haw. 523, the writ must set forth facts sufficient to authorize its issuance, and a demurrer to test its sufficiency lies to the writ, and not to the petition.

The first question reserved is answered in the affirmative,

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the first two questions raised by the demurrer to the petition being decisive of the proceeding. It is unnecessary to answer the other questions reserved, for which reason they are not considered, nor answered.

G. A. Davis for petitioners.

I. M. Stainback, Attorney General, and J. W. Cathcart, City and County Attorney, for respondent.

No. 787. J. ALFRED MAGOON, ET AL., v. LORD-YOUNG ENGINEERING COMPANY, LIMITED, AND CHARLES R. FORBES, SUPERINTENDENT OF PUBLIC WORKS, TERRITORY OF HAWAII. Appeal from Circuit Judge, First Circuit. Petitions of Respondents for Rehearing. Filed December 16 and 17, 1914. Decided December 24, 1914. Robertson, C.J., Quarles, J., and Whitney, Circuit Judge. The respondents have petitioned for a rehearing of the case the opinion in which appears ante, p. 327. All the grounds set forth in the petitions have been considered and found to be without merit. The petitions are denied under Rule 5. The concluding paragraph of the opinion was not intended to authorize an injunction against the filling of the streets within the district referred to, nor to restrict the superintendent of public works to a proceeding solely under R. L. Chap. 83, nor to prevent him from proceeding in any other lawful manner. These matters may be adjusted in the decree.

A. G. Smith, Deputy Attorney General, and Thompson, Wilder, Milverton & Lymer for petitioners.

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JOHN K. SUMNER v. ELIAS L. JONES.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED NOVEMBER 7, 1914.

DECIDED DECEMBER 24, 1914.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE WHITNEY,
IN PLACE OF QUARLES, J.

EQUITY—finding of trial judge—weight.

On an appeal in an equity case the findings of fact made by the circuit judge are not binding on the supreme court, but where the findings rest upon the credibility of witnesses and the weight of oral testimony, and inferences to be drawn from such testimony, and involve the consideration of opinion evidence, the findings of the judge who saw and heard the witnesses are entitled to much weight.

PRINCIPAL AND AGENT—transactions between—conveyance by principal to agent.

The rule that an agent to sell property may not sell it to himself is not involved in a transaction whereby the principal himself conveys property to his agent.

SAME—conveyances from principal to agent closely scrutinized—application of rule.

Gifts procured by agents and purchases made by them from their principals will be closely scrutinized, and an agent may purchase property from his principal only where he acts in entire good faith and makes full disclosure of all facts within his knowledge affecting the value of the property. The reason for the rule does not apply, however, where there was no prior confidential relation and the execution of a power of attorney creating the relation and the making of a conveyance of property are parts of one transaction. In such a case, it not appearing that the agent possessed any information concerning the property not possessed by his principal, there being no misrepresentation, concealment, or undue influence on the agent's part, nor mental incapacity on the part of the principal, a deed conveying property to him will not be set aside though the consideration was inadequate.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiff appeals from a decree of the third judge of the circuit court of the first circuit dismissing a bill in equity

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brought to set aside a deed executed by the plaintiff on the 15th day of July, 1911, purporting to convey to the defendant certain lands and other property. The grounds for the relief sought were the alleged fraud and undue influence on the part of the defendant, inadequacy of consideration, and mental incapacity on the part of the plaintiff. Undue influence on the part of one party to a transaction and mental incapacity on the part of another are inconsistent grounds for relief inasmuch as a claim that the one party acted under the domination of the other in effect presupposes the requisite legal capacity in the one. See *de Souza v. Soares*, 21 Haw. 330, 333. However, when this case was last before this court we held that the averments as to undue influence had not been sustained by the proofs. The case was then remanded to the circuit judge with instructions to reopen it for the purpose of considering such testimony as to the plaintiff's mental condition at the time of the execution of the deed as might be offered, there having been offers of such testimony at the first hearing. Ante, p. 23. The case was, accordingly, reopened and testimony offered on behalf of the plaintiff was admitted and considered. The circuit judge found that the plaintiff, at the time of the execution of the deed, thoroughly understood the nature thereof, and was mentally competent to execute the same; that no evidence had been adduced to prove to his satisfaction that the plaintiff, by reason of age or otherwise was incapable of entering into such a contract; and that the averments of the bill to that effect had not been proven.

In our former opinion we said "There is some evidence in the record which we think tends to show mental weakness on the part of the plaintiff at or before the time of the transaction in question, and it may be that upon the record before us we would be justified in holding that the deed ought not to be allowed to stand." The statement had reference to the improvident character of the transaction and the manner in which the plaintiff proceeded to bring it about coupled with the manner

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in which the plaintiff testified at the hearing. Under cross-examination he was argumentative, evasive and petulant, and he went so far as to deny that he signed the deed which it is sought to have cancelled. But it is not certain that this was due to mental weakness. It appeared in evidence that before executing the deed the plaintiff had had it read to him by a disinterested business man and the same is true in regard to the power of attorney which will be referred to. The testimony adduced at the second hearing added but little light to the situation. One witness who "had charge of his affairs with him" (Sumner) for about three years from 1904 to 1907, testified that he "always felt that he needed somebody to assist him and to manage his affairs with him." Another witness testified that in her opinion the plaintiff was not competent to transact business affairs nor capable of protecting himself in any matter involving his property. This opinion was based on the fact that some five or six years previously the plaintiff had offered to give the witness a piece of land of which he had lost possession, and his title to which was defective or difficult of assertion; that he had proposed going into the taro business with her though he had no money to put into the business; and that he had consulted her and sought her assistance with a view to acquiring a tract of land upon which he proposed to settle some families he desired to bring to this Territory from Tahiti, though he did not have the capital necessary to carry out the project. Another witness who expressed a similar opinion based it upon the fact that the plaintiff was extravagant, and spent his money, when he had any to spend, improvidently or put it into ventures that did not pay. And another witness who had known the plaintiff for about twenty years was of the opinion that the plaintiff was "deficient from old age." Two reasons were assigned for this opinion, one being that about four or five years ago the plaintiff had said to the witness that a certain piece of land forty by sixty feet in size would be a nice site for a hotel; the other was that "every time he has a man to look after his property he

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has always said now he has a good man that will not rob and steal from him, and in a very short time they would be changed and he would get rid of them."

Whether the evidence would have warranted a finding that the plaintiff lacked mental capacity sufficient to make a valid deed we need not say. On an appeal in an equity case the findings of fact made by a circuit judge are not binding on this court, but there is a presumption that the case was correctly decided, and where the findings rest upon the credibility of witnesses and the weight of oral testimony, and inferences to be drawn from such testimony, and involve the consideration of opinion evidence, the findings of the judge who saw and heard the witnesses are entitled to much weight. Mr. Sumner's affairs have been the subject of litigation in several previous cases. At one time he was adjudged to be insane but the adjudication was vacated. See *Kellett v. Sumner*, 15 Haw. 76, 79. The validity of the deed involved in this case must, however, be determined upon the showing made in this case, and, upon the record before us, we can find no sufficient reason for reversing the findings made by the circuit judge.

On behalf of the plaintiff it is contended that the relation of principal and agent which existed between the plaintiff and defendant at the time of the execution of the deed in question tainted the transaction with a legal presumption of fraud which rendered the deed voidable at the option of the grantor. It was shown by the evidence that on June 16, 1911, the plaintiff gave to the defendant a power of attorney authorizing him to "ask, demand, sue for, recover, collect and receive all rents and sums of money due and to become due hereafter on all my property situated in the Territory of Hawaii and belong to and owned by me, with full power and authority to sell, lease or rent the same." It is urged that the relation thus created between the parties was a fiducial one; that a trustee cannot occupy the dual position of buyer and seller; and the rule is invoked that an agent to sell property may not sell it to him-

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self. But here the defendant did not occupy such dual position. He did not sell it to himself. His principal conveyed to him. A different rule applies. "As a general rule an agent is not permitted to enter into any transaction with his principal on his own behalf respecting the subject-matter of the agency unless he acts with entire good faith and without any undue influence or imposition, and makes a full disclosure of all the facts and circumstances attending the transaction. * * * In accordance with the above rule all gifts procured by agents and purchases made by them from their principals should be closely scrutinized; and an agent can purchase property from his principal only where he acts in good faith and makes a full disclosure of all facts within his knowledge affecting the value of the property. * * * But where the agent makes a full disclosure of all the facts and acts honestly and in good faith, a purchase by him will be upheld; and a deed of gift by the principal to the agent will be good if there is no improper influence or conduct on the part of the agent in procuring it." 31 Cyc. 1442, 1444. *Burke v. Bours*, 98 Cal. 171, 176; *Rochester v. Levering*, 104 Ind. 562, 568; *Fisher's Appeal*, 34 Pa. St. 29, 31; *Kerby v. Kerby*, 57 Md. 345, 350; *Adair v. Craig* (Ala.) 33 So. 902. In *Ralston v. Turpin*, 129 U. S. 663, a gift from a principal to his agent was sustained. And if a principal may convey property to his agent without consideration, it logically follows that he may convey it upon a consideration less than its full value. The reason why gifts and sales from principal to agent are viewed with suspicion and closely scrutinized by the courts is that the nature of the relationship between the parties is such that the agent has probably secured the complete confidence of his principal and, during the continuance of the agency, has very likely acquired a better knowledge of the condition and value of the property than the principal possesses, and may take advantage of the principal. That reason does not apply in the case at bar. The evidence shows no relation of trust and confidence existing between these parties before the

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plaintiff offered to convey the property to the defendant. When the offer was made the defendant took it under consideration, and in order that he might look into the matter and ascertain what property the plaintiff had to convey, he suggested that the plaintiff should give him a power of attorney which would enable him to obtain from plaintiff's former agent the title papers pertaining to the property. That was done, and though the document was so worded as to give the defendant additional powers, including the power of sale, there is no evidence that, beyond receiving from the former agent the money in his hands belonging to the plaintiff, which was paid over to the plaintiff, any of those powers were exercised. Under these circumstances the execution of the power of attorney and the deed may well be regarded as parts of one transaction. No claim has been made that during the time which elapsed between the date of the power of attorney and that of the deed the defendant became possessed of any information relative to the property which was not previously possessed by the plaintiff. There was no misrepresentation, concealment, undue influence or other element of fraud. Upon the doctrine of the authorities cited the conveyance should be upheld.

The decree appealed from is affirmed.

Lorrin Andrews for plaintiff.

Holmes, Stanley & Olson for defendant.

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W. J. ROBINSON, THIRD JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT OF THE TERRITORY OF HAWAII, PLAINTIFF AND DEFENDANT IN ERROR, *v.* JESSIE K. KAAE AND ANTONINO A. LONG, DEFENDANTS, AND JOHN F. COLBURN, DEFENDANT AND PLAINTIFF IN ERROR.

MOTION TO QUASH WRIT OF ERROR.

ARGUED DECEMBER 7, 1914.

DECIDED JANUARY 2, 1915.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE EDINGS
IN PLACE OF QUARLES, J.

APPEAL AND ERROR—*necessary parties.*

All the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal or it will be dismissed except sufficient cause for the nonjoinder be shown.

SAME—*writ of error—statutory construction.*

Under sections 1869, 1874, R. L., any one of the defendants against whom a joint judgment is rendered, feeling himself aggrieved thereby, has a legal right to prosecute a writ of error for his own benefit but it must be done in the names of all the parties jointly interested in the judgment below.

SAME—*same—where some of defendants have filed bill of exceptions.*

Where one or more of several defendants against whom a joint judgment is rendered bring the case to this court for review on a bill of exceptions this does not operate as a severance which will justify another of the defendants in separately suing out a writ of error without making his codefendants parties thereto.

SAME—*same—appellate court—jurisdiction.*

The presence of all the necessary parties is essential to the jurisdiction of an appellate court and where the time has expired for suing out the writ the omitted parties cannot be brought in by an amendment.

OPINION OF THE COURT BY WATSON, J.

On the 5th day of May, 1914, in the circuit court of the first judicial circuit, a joint judgment was rendered in favor of the defendant in error, W. J. Robinson, third judge, etc.,

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against the said plaintiff in error John F. Colburn, Jessie K. Kaae and Antonino A. Long, in an action of debt predicated upon a certain bond in which defendant Kaae was principal and defendants Colburn and Long were sureties. To reverse this judgment Colburn, plaintiff in error, one of the defendants against whom the said judgment was rendered, has prosecuted this writ of error separately from the other defendants in the judgment. The defendant in error moves the court to quash the writ on the ground "that the defendants Jessie K. Kaae and Antonino A. Long are not parties thereto either as plaintiffs in error or defendants in error, and the plaintiff in error, John F. Colburn, is not entitled as a matter of law or of right to the said writ of error because of having failed to make the said codefendants parties thereto." Undoubtedly the general rule is that in cases at law where the judgment is joint all the parties against whom it is rendered must join in the writ of error or the writ will be dismissed. *Hardee v. Wilson*, 146 U. S. 180, 181; *Masterson v. Herndon*, 10 Wall. 416; *Simpson v. Greeley*, 20 Wall. 152; *Mason v. U. S.*, 136 U. S. 581; 2 Cyc. 763; 66 L. R. A., case note, 855. The rule has frequently been applied in cases similar to the one at bar, where a judgment or decree has been rendered against both principal and sureties on a bond, and it has uniformly been held that they should all join in the writ of error or appeal: *Cline et al v. Mitchell* (Wash.), 23 Pac. 1013; 2 Cyc. p. 764 and cases cited; 2 Cent. Dig., appeal and error, §1812. Counsel for plaintiff in error concedes the general rule to be as above stated, but contends (1) that under our statute it is not necessary to join all the parties to the action or suit below as parties plaintiff or defendant in error; (2) that the other parties defendant having brought the case to this court for review on exceptions, the present case comes within an exception to the general rule requiring that all parties in the cause below should be made parties plaintiff or defendant in error. The statutes

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relied on by plaintiff in error in support of his first contention are sections 1869 and 1874 of the Revised Laws, as follows:

Sec. 1869. "A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge or magistrate, or by any decision of any court except the supreme court, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of judgment."

Sec. 1874. "Writs of error in civil cases may be issued by the clerk of the judiciary department or his deputies as of right in term time or vacation, upon the application of any party to the original cause or of any personal representative of a deceased party."

We cannot give to the statutes in question the meaning contended for by counsel. It is true that the writ is one of right and any party named in the act has a legal right to prosecute a writ of error for his own benefit, but it must be done in the names of all the parties jointly interested in the judgment below. As was stated in *Smetters & Harris v. Rainey et al.*, 14 O. St. 287, 291-2, "Either one of the defendants, feeling himself aggrieved by the judgment, had the undoubted right to have his liability under it reconsidered on error, by filing his petition in error, and making all the other parties to the judgment parties, either as plaintiffs or defendants, to the petition, at any time within * * * but not after that period." This is the uniform construction which has been placed upon the statute by this court and we know of no reason why the rule as laid down should be departed from. *Bowler v. McIntyre*, 9 Haw. 308; *Castle v. Kapiolani Estate*, 16 Haw. 33, 34; *Territory v. Ah Sing*, 18 Haw. 393; *Ting v. Born*, 21 Haw. 638, 641.

As to the second contention urged by counsel, namely, "that the present case comes within an exception to the general rule requiring that all parties in the case below should be made parties plaintiff or defendant in error," it is argued that the co-defendants of the plaintiff in error have brought the case to this

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court on exceptions which are now pending here, of which fact this court will take judicial notice; and that by reason of having come up on exceptions the codefendants of the plaintiff in error are precluded from joining in or prosecuting this writ of error and "therefore could not possibly be made parties plaintiff in error." In other words, plaintiff in error claims that his codefendants, Kaae and Long, by filing their bill of exceptions in this court, have in effect severed their interest from that of plaintiff in error and that they are therefore precluded from joining in the writ of error. In support of this position *Ferreira v. H. R. T. & L. Co.*, 16 Haw. 406, is cited. The bill of exceptions referred to is not made a part of the record in this proceeding, nor is it averred in the petition for the writ of error that a bill of exceptions has been appealed to this court by said codefendants of plaintiff in error; but assuming, without deciding, that we may take cognizance of the pendency of the bill, as well as its contents, we are of the opinion that the *Ferreira* case does not sustain counsel's contention. In that case it was held that when a party has appealed a bill of exceptions and has also sued out a writ of error covering the same matters he will be obliged to elect which procedure he will follow. There is no question but that defendants Kaae and Long are parties deemed to be "aggrieved" by the judgment rendered, within the meaning of the statute, who could claim the right to be heard in this court. The fact that they have appealed a bill of exceptions would not preclude them from joining in the writ of error. Even assuming that the questions brought up for review by the bill of exceptions are identical with those raised by the assignments of error, defendants Kaae and Long would not necessarily be precluded from joining in and prosecuting the within writ of error. After filing the bill of exceptions they undoubtedly could have dismissed the same and sued out a writ of error, or, in the event the writ of error was sued out by them and was pending at the same time with the bill of exceptions, they could at most be required to elect which of the two

remedies they would pursue. This right of election cannot be exercised for them by their codefendant Colburn. We are therefore of the opinion that the filing of the bill of exceptions by defendants Kaae and Long did not operate as a severance which would justify defendant Colburn in suing out the writ without making his codefendants parties thereto. In *Simpson v. Greeley*, 20 Wall. 152, which is regarded as a leading case on this point, on pages 157-8, the court says: "Where the interest is joint and the interest of all is affected by the judgment the rule is universal that all must join in the writ of error or else it is open to the other party to demand that it be dismissed unless a severance of the parties in interest has been effected by summons and severance *or by some equivalent action appearing in the record.*" What is meant by the concluding words of the quotation "or by some equivalent action appearing in the record" is well illustrated in the cases of *Masterson v. Herndon*, *supra*; *Hardee v. Wilson*, *supra*; *O'Dowd v. Russell*, 14 Wall. 402; *Doty, et al., v. Strong*, 1 Pinn. (Wis.), 165, 168. In the *Masterson* case the court, speaking through Mr. Justice Miller, on page 418, says: "We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join." This language was quoted with approval in the *Hardee* case, *supra*, p. 182. In *Doty et al. v. Strong*, *supra*, the court says (p. 168): "The practice of summons and severance is not familiar to the American courts of error. The more easy and equally legitimate practice would be to enter a rule against those persons named in the writ of error as plaintiffs and not appearing, either to appear and assign error or to submit to be severed. In any practice, however, all the defendants in the judgment must first join in suing out the writ of error. We are of opinion, therefore, that the writ of error in this case be quashed * * *." We

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think both contentions advanced by counsel are without merit and that there is nothing in the facts in this case to take it out of the operation of the general rule.

It was suggested by the attorney for the plaintiff in error at the oral argument and again in the brief filed by him in this court on the motion to quash the writ of error that "in case the court should hold that the petition must set forth the reason for the nonjoinder of the defendants below as plaintiffs in error that plaintiff in error should be given leave to amend." An amendment such as suggested by counsel would in no wise help the position of the plaintiff in error. Again referring to the case of *Masterson v. Herndon*, supra, and adopting the language of the court in that case on page 418 as our own, "We should have held this appeal good if it had appeared in any way by the record that had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest." The presence of all necessary parties is essential to the jurisdiction of an appellate court and the time having expired for suing out the writ the omitted parties cannot be brought in by an amendment. 2 R. C. L. p. 66, §48; *Cornell v. Franklin* (Fla.), 23 So. 589; *Smetters v. Rainey*, supra.

The motion to quash the writ of error is granted and the proceedings in error dismissed.

J. Lightfoot for plaintiff in error.

Lorrin Andrews for defendant in error.

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W. J. ROBINSON, THIRD JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, *v.* JESSIE K. KAAE, JOHN F. COLBURN AND ANTONINO A. LONG.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 16, 1914.

DECIDED JANUARY 2, 1915.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE EDINGS
IN PLACE OF QUARLES, J.

BONDS—*words and phrases*—"lawful orders."

The phrase "lawful orders" in the condition of a probate bond that the principal shall "obey all lawful orders and directions of this court" does not mean orders free from error. An order made by a court having jurisdiction to make it is a lawful order though it be erroneous.

PRINCIPAL AND SURETY—*probate bonds—conclusiveness on sureties of judgment against principal.*

An order made by a circuit judge in probate against an executrix holding her to be indebted to the estate in a certain sum of money, surcharging her with such sum, and directing her to pay same into court, is, in the absence of fraud, conclusive against the sureties in an action on the bond, though the sureties, not being parties to the proceeding in which the order was made, could not have appealed from the order.

APPEAL AND ERROR—*appeals from orders of circuit judges in probate—parties.*

The sureties on the bond of an executrix who were not parties to a proceeding in probate on the settlement of the accounts of the executrix in which an order was made surcharging her with a certain sum of money cannot appeal from such order under R. L. Sec. 1859.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is an action brought by the obligee named in a bond given in probate by the executrix of the will and estate of Margaret V. Carter, deceased, against the principal and sureties thereon, for breach of condition. The plaintiff had judgment in the circuit court, and the case is here on the bill of excep-

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tions of the principal and one of the defendant sureties. The execution of the bond as alleged was admitted. The proofs showed an order made on November 5, 1910, and entered as of October 29, 1910, by the circuit judge sitting at chambers in probate, in the matter of the said estate, disallowing the final accounts of the principal as executrix and as administratrix *pendente lite*, surcharging her with the sum of \$730.28, and directing her to deposit said sum within ten days with the clerk of the court; and the failure of the executrix to comply with the order. The defendants offered testimony to show that the moneys, or a portion thereof, with which the principal had been so surcharged, had not been received by her in her capacity as executrix, but as administratrix *pendente lite* or as agent for trustees under the will, in neither of which situations did the bond in suit apply; the contention of the defendants being that they could be held liable for only such moneys as the principal had received and failed to account for as executrix. The circuit judge declined to admit the evidence.

Under the exceptions counsel for the defendants make two contentions, namely, that the order surcharging the principal in the bond shows on its face that she was surcharged with the sum named as a whole but in two capacities, executrix and administratrix *pendente lite*; and that that order was, at most, only *prima facie* evidence against the sureties, and that they should have been allowed to contradict or explain it, and show that it was erroneous.

The order in question recited that "The final account of Jessie K. Kaae, as administratrix *pendente lite*, and the final account of Jessie K. Kaae as executrix of the will of Margaret V. Carter, deceased," were heard, with certain objections thereto interposed by the guardian for certain minor heirs of the deceased, upon evidence adduced, and it was ordered and decreed that "the final accounts of the said Jessie K. Kaae, as administratrix *pendente lite* and as executrix of the will of the above named deceased, be and the same are hereby disallowed

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and disapprovd * * * that the said Jessie K. Kaae, as such executrix as aforesaid, is now indebted to the above named estate in the sum of \$730.28 * * * that the said Jessie K. Kaae, as such executrix, be and she is hereby surcharged with the said sum of \$730.28 * * * and that the said Jessie K. Kaae, as such executrix, within ten days from the date hereof, deposit with the clerk of this court the said sum," etc. It appears, therefore, that, though the accounts of the principal in both capacities were before the probate judge, and that both accounts were disallowed, it was in her capacity as executrix only that the order held her to be indebted to the estate, surcharged her, and directed her to pay the amount of the indebtedness into court. In view of this we are unable to sustain the first contention of counsel.

The conditions of the bond sued on were that "if said bounden principal shall well and truly execute the duties of her office, and shall well and truly account for all moneys and property that shall come to her hands or control as such executrix, and shall well and truly obey all lawful orders and directions of this court in the matter of the administration, distribution and disposition of the estate of Margaret V. Carter, deceased, then this obligation shall be void, otherwise of full force and effect." The phrase "lawful orders" does not mean orders free from error. We may assume for the present purpose that the order in probate was wrong in that it surcharged the principal as executrix for the whole sum named though a part of it was not received by her in that capacity. But the order cannot be attacked collaterally on that ground, and there is no suggestion that it was void for the want of jurisdiction in the circuit judge to make it, or for any other reason. An order made by a court having jurisdiction to make it is a lawful order though it be erroneous. *In the Matter of Cohen*, 5 Cal. 494; *Bearns v. Gould*, 77 N. Y. 455, 458; *Harrison v. Clark*, 87 N. Y. 572, 577. On the general subject of the conclusiveness against the sureties on a bond of a judgment against their principal

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the authorities are not in harmony, though there is little conflict on the point among the cases involving bonds similar to that in suit here. The terms of the obligation which represent the contract between the parties should constitute the dominant factor in determining the rights of the sureties. This was recognized in the case of *Rodini v. Lytle*, 17 Mont. 448, cited in the defendant's brief. That was an action against the principal and sureties on the bond of a constable, the condition of which was that the principal "shall faithfully perform all the duties of his said office as constable according to law." It was held that the judgment against the principal was not even *prima facie* evidence against the sureties. The court said (p. 450), "It is held by many courts that, when a bond is given to the effect that a principal will do a certain act,—as, for instance, pay a certain sum of money, or satisfy a judgment,—then the sureties are bound that he shall do such act; and the judgment against the principal is conclusive against the sureties." But that is not this case, and that question need not here be treated. The bond here was not for the performance of a specific act, but it was for general good and faithful conduct. It is as to judgments against principals who have given bonds of this nature—that is, official bonds of sheriffs and constables—that the difference of opinions among the authorities exists, and which difference we shall now note." The case of *Moses v. United States*, 166 U. S. 571, was an action against one of the sureties on a bond given by a disbursing officer of the United States, the condition of which was that the principal "shall and doth at all times henceforth and during his holding and remaining in said office carefully discharge the duties thereof and faithfully expend all public money and honestly account for the same and for all public property which shall or may come into his hands on account of Signal Service, U. S. Army, without fraud or delay." It was shown that in an action brought by the United States against the officer upon his defalcation judgment had been rendered against him. Judgment against the surety

was affirmed. The court said (p. 600), "Neither surety was a party to that judgment which was solely against Howgate, and the record in that case was admitted in evidence under the objection and exception of the defendants. We are of opinion that the judgment was properly admitted in evidence against the surety. It proved, at least, *prima facie* a breach of the bond by showing the amount of public moneys which Howgate the principal had failed to faithfully expend and honestly account for. It was far beyond the penalty in the bond, and, unexplained, the judgment was sufficient evidence of the breach of condition." On the other hand, in the class of cases to which the case at bar belongs, the supreme court has repeatedly held that a judgment against the principal conclusively binds the sureties. In *Washington Ice Co. v. Webster*, 125 U. S. 426, 446, which was an action by the obligee in a replevin bond conditioned to "return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment," the obligee having obtained judgment in the replevin action, and restitution of the goods not having been made, action was brought against the principal and sureties on the bond to recover the value of the goods as determined by the jury in the replevin case. It was held that the plaintiff was entitled to recover. The court said, "Such value was found by the jury, in finding the verdict, and, a judgment having been entered thereon, the fact so found is conclusive, not only upon the parties to the replevin suit, but upon those who became sureties by the bond to abide its event. The sureties became bound by the result of the replevin suit by virtue of their agreement contained in the bond." Also, "The sureties in the replevin bond were represented in the replevin suit by the plaintiff therein, and were identified with it in interest, and claimed in privity with it, so as to be concluded by the proceedings in that suit." *Bierce v. Waterhouse*, 219 U. S. 320, was an action on a redelivery bond given by the defendant in an action of replevin. The condition in the bond was that

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"the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may for any cause be recovered against the defendant." It was held, reversing this court, that the plaintiff was entitled to recover the value of the property as determined by the judgment in the action of replevin, the court saying (p. 335), "One who becomes a surety for the performance of the judgment of a court in a pending case is represented by his principal and is bound by the judgment against his principal within the limits of his obligation." It was also said that the questions litigated in the replevin action "were issues made and decided against the principal in the bond upon which the sureties were bound and cannot be relitigated, in the absence of fraud and collusion, by a surety when sued upon the bond." *Stovall v. Banks*, 10 Wall. 583, was an action against the principal and sureties in the bond of an administrator, for the use of certain distributees of the decedent's estate. At the trial the plaintiff offered in evidence the record in a suit in chancery in which the persons for whose use the action was brought were complainants, and the administrator with others who also claimed to be heirs and distributees of the estate, were defendants, by which it appeared that a certain sum was decreed to be paid to each of the complainants in the bill. In holding that error was committed in rejecting the evidence offered the supreme court said (p. 588), "It has been argued on behalf of the defendants in error that the decree of the superior court, if admitted, would have been only *prima facie* evidence against the sureties in the bond. Were that conceded it would not justify the exclusion of the evidence. But the concession cannot be made. The decree settled that the administrator of the intestate, Alfred Eubanks, held in his hands sums of money belonging to the equitable plaintiffs in this suit, as distributees of the intestate's estate, which he had been ordered to pay over by a court of competent jurisdiction, and the record established his failure to

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obey the order. Thereby a breach of his administration bond was conclusively shown. Certainly the administrator was concluded. And the sureties in the bond are bound to the full extent to which their principal is bound. A principal in a bond may be liable beyond the stipulations of the instrument, independently of them, but so far as his liability is in consequence of the bond, and by force of its terms, his surety is bound with him. There may be special defenses for a surety arising out of circumstances not existing in this case, but in their absence, whatever concludes his principal as an obligor concludes him. He cannot attack collaterally a decree made against an administrator for whose fidelity to his trust he has bound himself." In *Scofield v. Churchill*, 72 N. Y. 565, 570, where the condition of the bond was that an executor should "faithfully execute the trust" and "obey all orders of the surrogate of the county of Dutchess touching the estate committed," the court said, "It cannot be denied that a breach of this condition has occurred within the letter of the bond, and the positive undertaking of the sureties has become fixed and operative by the surrogate's decree. In the absence of fraud or collusion between the executor and the legatee, the decree of the surrogate is conclusive upon the sureties. It binds the principal and the sureties alike, and cannot be impeached in a collateral proceeding. While the most solemn judgments do not conclude those who are neither parties nor privies, yet, when an obligee undertakes the payment of a judgment which may be recovered against his principal, he cannot escape the effect of such judgment when recovered. He has bound himself to pay, and is indebted for the amount of the judgment when recovered, without regard to its legal merits. Such is the nature of his contract, and he must abide and stand by it, irrespective of the consequences. He cannot go behind it, or allege that it was erroneous and embraced more than was intended. The decree is final as to the indebtedness of the estate, and the obligation of the executor to pay, and the sureties cannot go back of such judgment." In

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a similar case, *Judge of Probate v. Quimby*, 89 Me. 574, 576, the sureties claimed that the money with which their principal had been charged as executor did not belong to the estate but to other parties for whom he held it in trust, and hence he should not have been charged with it in his account as executor. The court said, "The plaintiff contends that the question thus mooted is solely for the probate court and cannot be litigated here. This contention must be sustained. * * * The sureties further urge, however, that they could not be heard in the probate court, and had no right of appeal, and hence are not bound by the judgment, and must be heard here or be condemned unheard. This point must also be overruled. The bond they signed was a bond to the court, a bond in course of judicial procedure, somewhat like an appeal bond. The sureties were fully and effectually represented in the probate court by their principal, or in this case by his representative, his administrator. They signed the bond for the protection of the estate, and of all persons interested in it, against their principal. In signing it they, in effect, stipulated that their principal should abide and perform the decrees of the court upon all questions between him and the estate within the court's jurisdiction. They did not stipulate for any opportunity to object to any proceedings. They intrusted the representation of their principal's rights and interests to the principal himself. As well might the sureties upon an appeal bond question the judgment of the appellate court, as the sureties upon a probate bond question the decree of the probate court within its jurisdiction." The reason for the rule that a judgment against the principal is ordinarily conclusive in this class of cases is made clear by the foregoing quotations, and the principle is sustained by the clear weight of authority. 18 Cyc. 1272.

Counsel for the defendants point out that the circuit court in its decision assumed that the sureties might have appealed from the order made in probate against the executrix. They urge that the court was mistaken on that point, and contend

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that whatever the rule may be in jurisdictions where the sureties are accorded the right to appeal in such cases, where, as here, they have no such right, the order surcharging the executrix should not be held binding upon the sureties. We are of the opinion that under our statute relating to appeals from the orders and decrees of circuit judges in chambers (R. L. Sec. 1859) the sureties were not parties to the proceeding and could not have appealed from the probate order. See *Woodbury v. Hammond*, 54 Me. 332; *Tuxbury's Appeal*, 67 Me. 267; *Estate of McDermott*, 127 Cal. 450. See also *Farrar v. Parker*, 3 Allen 556; *Nolan v. Johns*, 108 Mo. 431, 436. But that, as appears from the reasoning of the cases above cited and quoted from, does not alter the situation.

In the case at bar the sureties covenanted that their principal would "obey all lawful orders and directions" of the judge sitting in probate "in the matter of the administration, distribution and disposition of the estate" of which she had been appointed executrix, and, there being no claim of fraud or collusion, the plaintiff made out a case against them by showing that the order in question had been made and that the executrix had not obeyed it.

The exceptions are overruled.

Lorrin Andrews for plaintiff.

R. J. O'Brien (*E. C. Peters* with him on the brief) for defendants Kaae and Long.

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NETTIE L. SCOTT v. E. N. PILIPO AND E. K. PILIPO.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED DECEMBER 21, 1914.

DECIDED JANUARY 5, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

LANDLORD AND TENANT—*quiet enjoyment—specific performance—remedy at law.*

The legal remedy of a lessee for the breach of a covenant for quiet enjoyment is an action of ejectment or an action on the covenant for damages. Specific performance is a purely equitable remedy and is obtainable only in cases where the legal remedy would be inadequate, impracticable or doubtful.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is a suit in equity in which the original bill of complaint prayed for the cancellation of a lease made between the defendants as lessors and the complainant as lessee, dated August 21, 1894, and for other relief. The case came to this court on an interlocutory appeal from an order overruling a demurrer to the bill, and there was a reversal. Ante, p. 174. Thereafter the circuit judge allowed an amended bill to be filed. The amended bill contains substantially the same averments of fact as the original bill contained, and they were summarized in the former opinion. The present bill prays that the defendants be required to specifically perform the covenant for quiet enjoyment contained in the lease by putting the complainant into possession of the demised premises, or so much thereof "as may remain available for possession by lessee;" that "in the event of the whole of the demised premises not being available for entry" the rent be apportioned; and that prior rents paid by the complainant be applied to the payment of rents to accrue after the complainant is given possession; and there is an alternative prayer to the effect that if the covenant "be impossible of performance" because of "no part being

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available for possession by lessee" the lease be cancelled and the amount of rental previously paid by the complainant be refunded to her. The circuit judge sustained a demurrer to the bill and the complainant appeals.

In so far as the alternative relief prayed for is concerned, it was held in the previous decision that, upon the averments to the bill, the complainant was not entitled to it, and it was suggested that upon the completion of the partition of the land the situation may become such that the complainant might be entitled to equitable relief of some sort. At present there appears to be no ground for resorting to equity. One ground of demurrer to the amended bill was that the complainant has a plain, adequate and complete remedy at law, and counsel urge that "the most usual remedy for a breach of covenant for quiet enjoyment is an action of covenant in which damages are sought and recovered in proportion to the injuries sustained," citing 24 Cyc. 1060. We are of the opinion that the position is well taken. We have already held that the inability of the complainant to obtain possession under her lease, if proven, would be a good defense to an action at law for the recovery of rent. (21 Haw. 766, 769; ante, p. 181.) For the breach of the covenant for quiet enjoyment the lessee, furthermore, may maintain an action for damages. Counsel for the complainant contends, however, that if the lessee's remedy is to be confined to an action at law for damages, or a defense against a claim for rent, the lessor may continue to withhold from the lessee possession of the premises which by the terms of the lease the lessee is entitled to, and that damages would not be an adequate or satisfactory substitute. But an adequate remedy at law is provided by an action of ejectment where the breach of covenant consists in the exclusion of the lessee by the lessor from possession of the demised premises. The remedy of specific performance is purely equitable and is obtainable as a substitute for the legal remedy of compensation only where the legal remedy is inadequate, impracticable or doubtful. 4 Pom. Eq.

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Jur. (3d ed.) Sec. 1401. See *Ahuna v. Kaunahikaua*, 3 Haw. 730; *Tai Lan v. Contrades*, 14 Haw. 392. If there be any doubt as to the adequacy of the complainant's affirmative legal remedies it arises out of the fact that pending the completion of the partition proceedings there will be a period in which, as it may be inferred from the bill, there will be uncertainty as to the actual status of the property, and the rights of the parties therein in severalty will not have been defined and settled. It is a difficulty which would affect equally the granting of relief in equity.

The mutual rights of these parties with respect to the lease in question have so often been discussed by this court that we do not feel called upon to go more at length into the matter at this time.

The decree appealed from is affirmed.

M. F. Scott for plaintiff.

N. W. Aluli (*E. K. Aiu* with him on the brief) for defendants.

KULUWAIMAKA OKAMURA (w) v. MELE KAULANI,
W. YIM SAM, YEE KAI YOU, TONG KAU, TRUS-
TEE FOR TONG CONEY, A MINOR, AND TONG
CONEY, A MINOR.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.
HON. H. E. COOPER, JUDGE.

ARGUED DECEMBER 14, 1914.

DECIDED JANUARY 7, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*failure to find material fact—new trial.*

Plaintiff, in an action to quiet title, relied upon a deed to her ancestor in which his initials had been inserted by interlineation; some circumstances impressed upon the face of the deed tended

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to show that the interlineations were made before execution, while others tended to show that they were made after execution, but there was no direct evidence to show when they were made; the trial court failed to find whether the interlineations were made before or after execution of the deed, but gave judgment for defendants: Held, that the time of making the interlineations was a material fact and the failure to find when they were made was reversible error for which plaintiff's exception to the decision on the ground that it was contrary to law and the evidence must be sustained, and a new trial granted.

ALTERATION OF INSTRUMENTS—*evidence—presumptions.*

Where a deed, the original draft of which appears to have been altered by interlineations, is introduced in evidence and some circumstances connected with the deed tend to show that the interlineations were made before execution, while others tend to show that they were made after execution, no presumption as to whether the alterations were made before or after execution should be indulged, but the court should find, as a fact, whether the alterations were made before or after execution of the deed.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced this action in the first circuit to obtain a judgment quieting title in her to certain lands which she claims to have inherited from K. A. Kapiioho, her deceased husband. The action was tried by the court, jury waived, and a decision in writing made as follows:

"FINDINGS OF FACT AND CONCLUSIONS OF LAW.

"The findings of fact asked for by the defense are declined, the court making the following findings of its own motion:

"Finds the following facts: The deed dated July 10th, 1888, was originally drawn as a conveyance to Kapiioho, senior; That at some time after the draft of the deed and before its recording the initials 'K. A.' were inserted before the first name 'Kapiioho,' and similarly inserted before the last name in the deed, 'Kapiioho;' That there is no proof that the interlineations were made before execution; That the K. A. Kapiioho mentioned in the deed referred to the son; That the deed was recorded by Kapiioho, senior, and that there has been no manual delivery of the deed to K. A. Kapiioho; That the son, K. A. Kapiioho, had no knowledge of the conveyance until

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June, 1900; That K. A. Kapiioho never assumed any dominion or control over the land in question to the exclusion of the father; That Kapiioho, senior, maintained dominion over the land exclusively and completely, with the exception of the request to the son to convey to him under the deed of June, 1900; That the deed of June, 1900, was for the purpose of overcoming the incident of the deed being recorded with the interlined initials; That the intended gift was never revealed by Kapiioho, senior, and never was disclosed by Kapiioho, senior, until the tender of the deed of June, 1900; That the claim that the plaintiff can hold under the deed to 'I.' or 'J.' Kapiioho is not supported by the evidence.

"Conclusions of law: That there is no presumption that the material interlineation was inserted before execution; That the plaintiff claiming under such a conveyance has always assumed and must carry the burden of proof that the interlineation was made before execution and the deed valid to that extent. There can be no successful claim that the widow is entitled to dower in her husband's land if the husband himself could not hold the land under the conveyance.

"The final conclusion of law is that judgment must be entered in favor of the defendants.

"(Sgd) H. E. Cooper

"First Judge.

"Dated Honolulu, Hawaii, Dec. 23, 1913."

Thereupon judgment was entered that plaintiff has no title to any of the lands and that the title thereto is in the defendants. The plaintiff moved for a new trial, which was denied, and brings the case here upon exceptions. We consider many of the exceptions as immaterial, the serious one being the exception to the conclusions of law, above shown, and to the decision. The trial court did not find, as it should have done, the time at which the changes in the original draft of the deed from Mailou were made, but held that the burden was on the plaintiff to show that such changes were made prior to the execution of the deed. This is tantamount to holding that in the absence of evidence to the contrary the presumption of law is that the changes were made after execution. There is a conflict of authority as

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to the presumption, if any, which should be indulged where an instrument is relied upon by a party, and it is apparent that alterations have been made in the same, and there is no evidence to show when such alterations were made; some holding that the presumption of law is that the alterations were made before execution; others that they were made after execution; and others that no presumption should be indulged. Ever since the days of Lord Coke the presumption of law in such cases in England has been that the alterations were made before execution. The supreme court of the United States has adopted the same rule, and many of the states have followed it. As to deeds, there are few exceptions to the rule; but, as to negotiable instruments, there is much conflict of authority; many courts holding that one who takes a negotiable instrument which has apparently been altered does so with notice, and must be prepared to show that the alterations were made before execution. The weight of authority is in favor of the presumption that an alteration was made before execution where there is no evidence to show when it was made. (*Wilson v. Hayes*, 40 Minn. 531; *Stillwell v. Patton*, 108 Mo. 352; *Burnett v. McCluey*, 78 Mo. 676; *Dorsey v. Conrad*, 49 Neb. 443; *Gooch v. Bryant*, 13 Me. 386; *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424; *Norfleet v. Edwards*, 52 N. C. 455; *Franklin v. Baker*, 48 Ohio St. 296; *Cass County v. Bank*, 9 N. D. 263; *Rankin v. Tygard*, 198 Fed. 804; *Little v. Herndon*, 10 Wall. 26; *Hanrick v. Patrick*, 119 U. S. 156; *Kleeb v. Bard*, 12 Wash. 140; *Blewett v. Bash*, 22 Wash. 536; *Arnold v. Brechtel* (Mich.), 140 N. W. 610; *Ensign v. Fogg* (Mich.), 143 N. W. 82; *Musser v. Musser*, 92 Neb. 387; *Cross v. Aby* (Fla.), 45 So. 820; *McConnell v. Slappey* (Ga.), 67 S. E. 440; *James v. Holdam*, 142 Ky. 450; *Gunkel v. Seiberth* (Ky.), 85 S. W. 733; *Kilpatrick v. Wiley*, 197 Mo. 123; *Colby v. Foxworthy*, 80 Neb. 239; *Barber v. Mfg. Co.*, 81 Neb. 517; *Trust Co. v. Levtzow*, 23 S. D. 562; *Ernster v. Christianson*, 24 S. D. 103; *Hagan v. Ins. Co.*, 81 Iowa 321.) As

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to the authorities holding the burden of explaining an apparent alteration of an instrument to be upon one offering it, and those holding that no presumption exists as to whether an apparent alteration was made before or after execution, see 1 Ruling Case Law, title Alteration of Instruments, Secs. 73 to 82. The case of *Kahai v. Kamai*, 8 Haw. 694, was tried by Mr. Justice Bickerton, sitting as a trial court. In that case a deed was offered in ejectment and showed on its face that it had been altered, and a certificate was attached to it showing that the alteration was made two days after execution. Under those circumstances it was held that the party offering it must show that the alterations were made with the knowledge and consent of the grantor. No presumption, in such a case, can be indulged either way, the deed carrying evidence on its face that it had been altered after execution. In the case at bar the trial court points out no feature of the deed showing that the changes in the original draft were made after execution, and we fail to find any such from an inspection of the original instrument. There are certain circumstances impressed upon the deed which should have a bearing in determining whether the changes were made after or before execution. It is probably incorrect to speak of the changes as alterations. If the interlineations were made before execution, there is no alteration of the deed made by the grantor, and the title of the property described in the Mailou deed was conveyed to plaintiff's ancestor. If the interlineations were made after execution, the title was conveyed to some one by the name of Kapiioho, either to plaintiff's ancestor, or to some one else. We will examine the instrument and ascertain the alleged alterations, in what they consist, and how made, judging from the appearance of the deed itself. The alleged alterations consist in inserting in the deed by interlineation, the initial letters, "K. A.," before the name of the grantee in three different places. The ink with which the body of the deed was written is of lighter color than that used in making these interlineations, and was written in what appears to be a

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different handwriting. There is another significant interlineation not complained of, found in the closing sentence giving the date of the deed, to wit, the insertion, by interlineation, of the figures and letters "10th" before the month, so as to make the date of the deed read July 10th, 1888. This insertion, by interlineation, and another, the word "and" written between the figures giving the pages of a liber in the office of the registrar of conveyances,—referred to in the deed,—appear to be in the same colored ink as that in which the other interlineations were made. It appears that in making the original draft of the deed, the name of the wife of the grantor, "Maleka," was omitted, but a blank left therefor, which was filled by writing in her name and this appears to have been done with the same ink used in writing the other interlineations. As interlined, the deed bears date July 10th, 1888; it was acknowledged by the grantor and wife on the 11th day of July, 1888, and was filed for record by L. H. Kapiioho, July 12th, 1888. The title of the deed was endorsed on the back of it in the same color of ink used in making the interlineations, and in filling in the name of the wife of the grantor, and in writing the name of the attesting witness. The evidence shows that L. H. Kapiioho, under whom the defendants claim, and whom they claim to have been the original grantee, was the father of K. A. Kapiioho; that on one occasion the father pointed out some of the land to the son and told him that he (the son) could sell it as it belonged to him (the son); that in June, 1900, the father had prepared and sent to the son a quitclaim deed releasing to the father the lands described in the said deed from John Mailou, in question, but the son refused to execute the said quitclaim deed. There is evidence in the record showing that L. H. Kapiioho declared on one occasion that the name of his son was written in the deed from Mailou at the suggestion of Mr. Dimond. Five witnesses testify to his having said, at different times, one occasion being as late as 1905 or 1906, that his son owned part of the land occupied by him. Other circumstances may be regard-

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ed as tending to show that the interlineations were made after execution. Without ruling as to what presumption, if any, should have been indulged by the trial court, we hold, under the circumstances and evidence in this case, that the trial court should have found whether the interlineations complained of were made before or after the execution of the deed.

The defendants contend that under the well established rule that if a judgment is correct for any reason, that an appellate court should maintain it, although the trial court gave an erroneous reason for the judgment; that good reasons are shown by the record in support of the correctness of the judgment; and that the judgment is not contrary to law, nor contrary to the evidence, as is apparent of record, for that, if it be determined that the interlineations were made before execution passing the title to the son, that it was an incomplete gift from the father, not accepted by the son; and that there was no delivery of the deed to the son; and on the further ground that the plaintiff's claim has been defeated by adverse possession in the father, and in the defendants who claim under deed made by the father in 1910. If the deed conveyed title from Mailou to the son, the action of the father in placing it on record for the son should be considered as a delivery to the son, and the father regarded as a self constituted agent for the son. It appears that the first time that the son learned that the deed from Mailou named himself as grantee was in June, 1900, when the father asked him to execute a quitclaim deed. The action of the son should be regarded as an election to accept the gift from his father and retain title; and it amounted also to a ratification of the acts of his father in accepting and recording, as agent for himself, the Mailou deed. The essential elements of adverse possession, in the father, of the land conveyed by the Mailou deed, are not established by uncontradicted evidence, as some of the evidence tends to show that he held this land for his son. We are therefore of the opinion that the exceptions to the decision and judgment and denial of a new trial cannot be overruled on

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the grounds contended for by the defendants.

Some evidence was introduced to show the identity of plaintiff's deceased husband as the grantee in another deed in which Keahilele was grantor to "I." or "J." Kapiioho, but we think the trial court did not err in holding the evidence insufficient to establish that fact, hence the exception as to this ruling is not sustained.

The exceptions are sustained, a new trial is granted, and the cause is remanded to the circuit court for further proceedings consistent with the views herein expressed.

C. F. Peterson for plaintiff.

J. A. Magoon and *A. Lindsay, Jr.*, for defendants.

CONCURRING OPINION OF ROBERTSON, C. J.

I agree with the conclusion that the judgment should be reversed and a new trial granted.

As to two of the three pieces of land in dispute, plaintiff and defendants deraign title from one Mailou. On July 10th, 1888, Mailou executed a deed which was originally drafted as a conveyance to "Kapiioho, of Honolulu." There was evidence tending to show that this Kapiioho was also known as "Lono," "L. H." and, it seems, as "I." Kapiioho; and that he had a son who lived at Naalehu, Kau, Island of Hawaii, who was variously known as "Kaiakoili," and "Joseph" and "K. A." Kapiioho. Kapiioho of Honolulu conveyed to Mele Kaulani, one of the defendants. Kapiioho of Naalehu died intestate without issue, and the plaintiff, his widow, who has since remarried, claims an undivided one-half of the premises as an heir at law. The deed of Mailou shows upon its face that the initials "K. A." were interlined in three places before "Kapiioho" in a handwriting and ink different from that of the body of the deed except, as explained in the foregoing opinion, that the word "and," the name "Maleka," and the day of the month "10th" were also in a handwriting and ink different from that used by the scrivener who drafted the deed. The name of the grant-

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or's wife, Maleka, for the insertion of which a blank space had been left, it is reasonable to presume, was inserted before execution, and if the initials "K. A." are in the same ink and handwriting, it would be *prima facie* evidence that they also were interlined before the deed was executed, and would be sufficient, in the absence of anything to the contrary, to establish the fact. If the initials "K. A." were interlined before execution the title passed by the deed not to Kapiioho senior but to Kapiioho the son, and in that case the plaintiff's claim would be good unless, as contended by the defendants, the father obtained title as against his son by adverse possession. The contention of the defendants is that it was not shown that the initials were interlined before execution, and their theory seems to be that it was an alteration made by Kapiioho senior after the deed had been delivered to him, it being his intention to thereby transfer the title to his son as a gift. Perhaps the circumstances that the description of the grantee was not changed from "Honolulu" to "Naalehu," and that the undertaking on the part of the grantee to pay off a certain mortgage was left as originally upon "said Kapiioho" when it appears not to have been the intention of Kapiioho senior that his son was to assume that burden, tend to support the defendants' theory. If the son's initials were inserted by Kapiioho after delivery of the deed to him the act would not have had the effect of divesting himself of the title and passing it to his son, and the plaintiff would, therefore, have failed to show any title in herself. What has been said has reference only to what an examination of the deed itself discloses. There may be other facts in evidence which tend to support one theory or the other, but the testimony relating to declarations said to have been made by Kapiioho senior to the effect that his son owned an interest in the land is as consistent with the theory that he had made an attempt to transfer the title to his son, which was ineffectual in law, as that the interlineation was made in the deed before its execution.

I think the trial court was right in holding that "there is no

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presumption that the material interlineation was inserted before execution." There is a conflict of authority on the question whether an alteration in a deed is to be presumed to have been made before its execution, or afterwards, or whether there is any presumption at all. The weight of authority at the present time seems to favor the rule that as fraud cannot be presumed the presumption must be that a material alteration was made before execution of the instrument, though modern text-writers take the view that the sounder rule is that the question is one of pure fact uninfluenced by any presumption one way or the other. "The modern tendency is to * * * abandon the so-called presumption against fraud * * * and to raise no genuine presumption in that regard," 4 Wigmore on Evidence, Sec. 2525; "This is a safer and better rule," 2 Jones, Real Prop., Sec. 1367; "The better reasoning," 1 R. C. L. p. 1043, §76; "The view best supported by reason, and the one to which the authorities seem tending," 2 A. & E. Enc. Law, 274; "The view best supported by the authorities," 2 Cyc. 243. In the case at bar there is no suggestion of fraud. There is no contention that the initials were inserted by or through the connivance of the son. The deed was placed on record by Kapiioho senior, and the evidence was uncontradicted that the son did not know of its existence until about twelve years after its execution. The reason for the rule that there is a presumption that alterations in deeds were made before execution—that fraud is not to be presumed—having no application here, the rule itself should not be applied. The burden of proof was upon the plaintiff, and subject to the shifting duty to go forward with evidence, it was for her to show that her former husband acquired title under the deed in question. See Wigmore, *supra*. But in holding that there was "no proof" that the initials were interlined before the execution of the deed, or, as put in its decision overruling the motion for a new trial, "there was no evidence tending to show that the interlineation was made before execution," the court below was in error. True, there was no direct testi-

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mony as to when the interlineation was made, probably none was procurable, but there was some evidence, the deed itself at least, upon which a finding could and ought to have been based.

As to the other piece of land in dispute, plaintiff and defendants claim from one Keahilele who conveyed it to "I." Kapiioho, of Kahehuna, Honolulu. I agree in the conclusion that the trial court committed no error in holding that the plaintiff failed to prove her claim of title to that parcel.

CONCURRING OPINION OF WATSON, J.

The facts in this case are sufficiently stated in the foregoing opinions. I concur in the conclusion that the exceptions must be sustained, the judgment reversed and the case remanded to the circuit court for a new trial,—this for the reason that there is evidence in the case upon which the trial court should have found whether the interlineations complained of were made before or after the execution of the Mailou deed. As I read the opinions of my associates, we are agreed on this point—that there is evidence in the record upon which such a finding should be based. This being true, I am of the opinion that the question discussed in the foregoing opinions as to what presumption, if any, should be indulged *in a case where there is no evidence* is, so far as this case is concerned, academic. On that point I express no opinion, believing, as I do, that it is not involved in the case before us.

I further agree with the conclusion that the plaintiff failed to prove her claim of title to the parcel of land conveyed by one Keahilele to "I." Kapiioho.

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JOHN MAKAHIO v. KALEIONEHU MAKAHIO.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

HON. S. B. KINGSBURY, JUDGE.

SUBMITTED DECEMBER 14, 1914.

DECIDED JANUARY 12, 1915.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ASHFORD,
IN PLACE OF QUARLES, J., DISQUALIFIED.

DIVORCE—cross-libel for separation—affirmative relief.

Under Act 121, Laws of 1913, which provides that a cross-libel may be filed in any action for divorce and affirmative relief granted thereon as fully and effectually as in original petitions for divorce, a cross-libel may be filed by the libellee in a divorce action praying for a separation from libellant and in a proper case the relief prayed may be awarded to the libellee upon such cross-libel.

SAME—public hearing.

Under Sec. 2229, Revised Laws, providing that no divorce case shall be heard except openly in the public court-rooms, while it may in certain cases be proper to exclude from the court-room persons of immature years, the circuit judge has no power to hear a case except openly in the public court-room and the taking of testimony by the judge in his private chambers behind closed doors is error for which the case must be reversed.

OPINION OF THE COURT BY WATSON, J.

This is an appeal from a decree made by the judge of the second circuit court granting a separation to the libellee in the above entitled cause upon the answer and cross-bill filed by her to libellant's libel for divorce. On the 20th day of June, 1913, John Makahio filed his libel praying for an absolute divorce from his wife, Kaleionehu Makahio, on the ground of the habitual intemperance of the libellee for a period of four years prior to June 19, 1913. To this libel an answer and cross-bill was filed by the libellee on the 2d day of August, 1913. In her answer libellee admits her marriage to libellant, the jurisdic-

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tion, and that there is no issue from said marriage. She further admits that during four years prior to June 19, 1913, she had been addicted to the use of strong spirituous liquors; that during said period she had on occasions been under the influence of liquor, which she alleges her husband compelled her to drink; and that he had been otherwise guilty of extreme cruelty towards her, said answer praying that libellant's libel be dismissed. Together with this answer libellee filed a cross-bill praying for a separation from the libellant on the grounds of (1) excessive and habitual ill-treatment; (2) habitual drunkenness; (3) neglect to provide the necessities of life. Libellant filed a motion to strike libellee's cross-bill from the files on the ground that the court was without jurisdiction in the pending proceeding to grant a separation to libellee as prayed for in her said cross-bill. This motion was denied. The cases were tried together and were heard and finally submitted by both sides to the Honorable S. B. Kingsbury, the then judge of the circuit court of the second judicial circuit, on the 13th day of May, 1914, the court, at the close of the evidence on said last mentioned date, taking said causes under advisement. It appears from the transcript of evidence which is made a part of the record in this case on appeal, and also by the affidavit of Edmund H. Hart, Esq., clerk of the circuit court of the second judicial circuit, on file in this court, that the said judge before whom said causes were tried, after the same had been finally submitted by the parties and by him taken under advisement, on to wit, June '8, 1914, proceeded to reopen said causes in his private chambers by taking further evidence from the libellee herein, neither the libellant nor his attorney being notified of this proceeding and neither of them being present; that again, on the 9th day of June, 1914, the said judge, in his private office, in the absence of the parties hereto or their counsel, and behind closed doors, further reopened said causes for the taking of additional testimony and proceeded to examine certain witnesses who had been subpoenaed by the direction of said judge to

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appear at said time and place and give their evidence. Neither of the parties hereto nor their respective attorneys were notified by the judge of his intention to reopen the causes for the taking of further evidence nor were said parties or their counsel given an opportunity to be present and examine or cross-examine such witnesses.

The circuit judge found the following facts: "That the * * * libellee had been in the habit of becoming intoxicated;" that she "was weak mentally and physically; * * * that the libellant had treated her with extreme cruelty, and that he was largely to blame for her use of intoxicating liquors. * * * That the libellant is not entitled to a divorce from the libellee and that justice and equity require that libellee be granted her petition of separation from bed and board from the libellant and a reasonable amount for her support;" and thereupon the circuit judge prepared and entered a decree "That the parties, John Makahio and Kaleioneahu, are separated and the prayer of the libellee for separation is hereby granted." Provision is further made in the decree for the payment by libellant to libellee of the sum of \$150 for her support pending the proceedings, alimony at the rate of \$25 per month, and an additional fee of \$25 to be paid to her attorney. From this decree libellant appeals. The case was submitted in this court on briefs and counsel for libellant here urges a number of reasons why the decree should be reversed. In the view we take of the case it is only necessary to discuss two of the points raised by counsel, viz: (1) that a separation cannot be granted to a libellee on an answer and cross-bill to libellant's libel for divorce; (2) that the hearing must be held openly in the public court-room.

In support of the first contention counsel relies on the case of *Lazarus v. Lazarus*, reported in 9 Haw. 350, where this court held that the statutes then in force concerning divorce and separation did not authorize the granting of a separation to a libellee on an answer and cross-bill to libellant's libel for divorce. This case was decided in 1894, and we think correctly interprets

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the statutes as they existed at that time. By Act 121 of the Session Laws of 1913 it is provided, however, that "A cross-libel may be filed in any action for divorce and affirmative relief granted thereon as fully and effectually as in original petitions for divorce." Under this enactment we are of the opinion that a cross-libel may be filed by the libellee, in an action for divorce, praying for a separation from libellant, and that in a proper case the relief prayed may be awarded to the libellee upon such cross-bill. 7 Ency. Pl. & Pr. p. 99; 14 Cyc. p. 673.

As to the second point. Section 2229 of the Revised Laws provides that no divorce case shall be heard "except openly in the public court rooms." This provision of the statute is mandatory and one which the trial judge was not at liberty to disregard. Circuit judges have no power to hear divorce cases except openly in the public court-rooms and should never do so. "It may be wise, and, indeed, we think it right to exclude from such hearings persons of such immature years as in the judgment of the court should not be permitted to listen to the testimony, but that the general public cannot be excluded from such trials is clear." *Harkins v. Harkins* (Ia.), 99 N. W. 154. The action of the circuit judge in reopening this case and taking testimony in his private chambers behind closed doors was in utter disregard of the statute, and his misconduct in that regard was heightened by the fact that such proceedings were had without notice to the parties or their counsel and without giving them an opportunity to be present.

The decree appealed from is reversed and the cause remanded.

W. F. Crockett for libellant.

E. Murphy for libellee.

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MANUEL MACEDO, JR., v. CHRISTINA MACEDO.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED JANUARY 4, 1915.

DECIDED JANUARY 14, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

DIVORCE—*separate grounds for, separate causes of action.*

Separate statutory grounds for divorce constitute separate causes of action, and a libellant is not bound to allege or disclose every known existing ground for divorce in one suit under penalty of being foreclosed thereafter from setting up any ground not so alleged or disclosed.

SAME—*res judicata—burden of proof.*

Where the ground for divorce set up in a second suit is the same as that which was alleged in a former suit between parties, though based on different facts, but no new facts occurring subsequent to the first case are averred, the former decree is conclusive unless it be shown that the party was ignorant of the existence of the facts at the time of the first trial. But if new grounds for divorce are set up in the second suit the decree in the former suit will not operate as a bar except as to such matters as were therein actually decided, and where the record in the former suit does not disclose upon what ground the decree rested the burden is upon the party asserting the estoppel to prove that the fact or matter relied on was litigated and determined in that suit.

SAME—*decree dismissing libel for divorce—ground of dismissal uncertain.*

In a case where it is uncertain upon which of several grounds of defense a decree dismissing a libel for divorce rested, the decree, notwithstanding the uncertainty, will operate as an estoppel in a subsequent suit brought by the libellant on the same facts, where it is immaterial upon which ground the former decree was based.

OPINION OF THE COURT BY ROBERTSON, C. J.

On June 27, 1914, the libellant, Manuel Macedo, Jr., instituted against his wife a suit for divorce from the bond of matrimony in the circuit court of the first circuit, at chambers, charging her with having wilfully and utterly deserted him

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from and since the 25th day of April, 1913. The libellee filed an answer and cross-libel. In her answer she admitted that she had left her husband at or about the time alleged, and averred that she was compelled to do so by reason of his cruel treatment of her and his failure to provide suitable maintenance for her. In her cross-libel she averred extreme cruelty on the part of her husband which compelled her to leave him on or about the 25th day of April, 1913, and his refusal to provide her with suitable maintenance, though of sufficient ability to provide the same, for more than sixty days preceding said date, and since said date for a continuous period of more than sixty days from the date of the filing of the libel; and she prayed for an absolute divorce with alimony.

At the hearing the libellant introduced in evidence the record in a previous suit between the parties wherein the wife, as libellant, had sought a divorce from her husband. The record included the libel, filed July 14, 1913, which averred that the parties were married at Honolulu, on the 26th day of December, 1896, and had ever since lived together at Honolulu as husband and wife, that she had been compelled, because of abusive language, threats and ill-treatment by her husband, to leave him on or about the 25th day of April, 1913, and that for a continuous period of more than sixty days he had neglected and refused to provide her with suitable maintenance, though of sufficient ability to provide same; the answer of the libellee in which he admitted the marriage and denied each and every other allegation set forth in the libel; and the decree, dated the 19th day of May, 1914, made by the second judge of the circuit court of the first circuit, which, after reciting that the parties were present, the libel had been heard, evidence adduced, arguments of counsel made, and the court fully advised in the premises, ordered and decreed "that the prayer of the libellant is denied and the libel dismissed."

In the case at bar the trial judge intimated that the testimony showed extreme cruelty on the part of the husband toward

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his wife between November 1912, and the time of her leaving him in April 1913, and said that if the question were open to him to decide on the merits he would incline to the view that the wife, upon her cross-libel, would be entitled to a divorce upon the double ground of extreme cruelty and failure to provide suitable maintenance on the part of the husband. It was held, however, that no new facts were alleged and that the decree in the former suit precluded the wife from urging in this case any facts which existed or any conduct indulged in by her husband prior to July 14, 1913, either as a defense to the husband's present suit, or by way of affirmative relief in support of her cross-libel. From this it followed that as the libellant had established the fact of his wife's desertion, and its continuance for one year, the divorce should be granted as prayed for. A decree was entered in accordance with the finding, granting a divorce to the libellant, and dismissing the cross-libel. The libellee appeals.

The trial judge took the view, citing *Bartlett v. Bartlett*, 113 Mass. 312; *Wagoner v. Wagoner*, 25 Atl. (Md.) 338; and 1 Van Fleet on Former Adjudication, pp. 204, 307, that the maxim that no person shall be twice vexed for one and the same cause, applied to divorce cases, requires that the libellant shall set up in the one case all the grounds for divorce he or she has or intends to rely on, and that "it is contrary to the policy of our law that a person having, or conceiving himself to have, several causes of action for divorce, may select one or more of such causes from a greater number, and, having unsuccessfully litigated such one or more causes, still be at liberty to litigate the causes, or any of the causes, which were omitted from the first suit." In the *Bartlett* case a libel brought against the wife alleging adultery was held barred by the decree in a former suit wherein the libel of the husband charging desertion had been dismissed, the adultery being known to him at the time of the first suit. The court said, "Good faith and justice required the husband, if he intended at any future time to rely

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on the graver charge, to suggest the fact before his first libel was dismissed, so that the court might, if it thought consistent with the interests of the parties and of the public, order the dismissal to be without prejudice to a subsequent libel, and the libellee might take measures to preserve any evidence material to her defense. The husband not having done this, or shown any reason for not doing it, must be deemed to have waived any right to a divorce depending exclusively upon facts existing and known to him at the time of his first application to the court." The case appears not to be in harmony with the current of authority, and, it seems to us, is opposed to good reason. If the law or public policy requires that a party seeking a divorce should allege, or, at least, disclose to the court every existing ground known to the party, or be estopped from thereafter asserting any such ground not alleged or disclosed, the same law or policy, to be consistent, should demand that every respondent should set up every ground of defense he may have to the suit or be thereafter precluded from asserting it. The contrary, however, was held in *Watts v. Watts*, 160 Mass. 464. It would be to go but a short step farther in the same direction to hold that where one spouse sues another for divorce the other is in duty bound to assert any known ground that may then exist that might be made the subject of a cross-libel, or forever after hold his peace as to such ground. But what good purpose would be served by such a rule? Such a rule would provoke parties to litigate possible causes for divorce whereas it is the policy of the law to encourage condonation and the amicable settlement of marital differences. The case of *Wagoner v. Wagoner*, supra, does not go to the length claimed for it for there the ground relied on in both suits was adultery, and though different acts were alleged in the second suit they antedated the first suit. It is well settled that where the ground of divorce in the second suit is the same as in the first, though based on different facts, but no new facts occurring subsequent to the first case are alleged, the former decree is conclusive except where the

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party was ignorant of the existence of the facts at the time of the first trial. 14 Cyc. 725; *Fera v. Fera*, 98 Mass. 155; *Lewis v. Lewis*, 106 Mass. 309; *Edgerly v. Edgerly*, 112 Mass. 53; *Morrison v. Morrison*, 142 Mass. 361; *Lee v. Lee*, 38 Okl. 388. The same rule would apply where the ground set up in the second suit, though different from that of the first, necessarily involves a material question of fact which would be supported by the same evidence or stronger evidence of the same kind. For example, where, in a suit by the wife on the ground of the husband's failure to provide maintenance the question whether she was justified in leaving her husband was litigated and decided adversely to the wife's claim, she could not, in the absence of subsequently occurring facts, maintain a libel against her husband on the ground of extreme cruelty, for a state of facts which did not justify her in leaving him certainly did not amount to extreme cruelty, and so, though the second suit set up a different statutory ground, it would be held to have been concluded by the prior decree. The reverse would be the case, however, if after the dismissal of a suit by a wife on the ground of extreme cruelty, the husband brings suit against her on the ground of desertion. There the wife would not be estopped by the former decree from showing in defense that the husband's conduct had been such as to justify her in leaving his home. Such was the ruling made in *Rand v. Rand*, 58 N. H. 536, a case condemned as "unsound" by Mr. Van Fleet. But the obvious reason for the ruling was concisely stated in that case as follows: "The issue determined by the former proceeding was that of extreme cruelty. The court cannot say, as matter of law, that cruel acts of the husband which would justify his wife in leaving him would always be such extreme cruelty as would entitle her to a divorce on that ground." *Lyster v. Lyster*, 111 Mass. 327, is to the same effect. In the recent case of *Prall v. Prall* (Fla.) 26 L. R. A. N. S. 577, 583, the court said, "While the welfare of society demands exemption from unnecessary and vexatious divorce

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litigation, the principles of *res judicata* should not be so applied as to prevent one determination of every distinct cause of action, under the statutes authorizing divorces for specific and separate species of misconduct."

The burden of proving a former adjudication is upon the party who sets it up. *Lau Lam v. Whitcomb*, 21 Haw. 252, 255. Counsel for the libellee contends that the burden was not sustained. The respondent's answer in the former suit put in issue every fact averred in the libel except that of the marriage, and the decree is silent as to the ground upon which the judge based his conclusion. Failure of proof as to either the jurisdictional facts, or that the husband had failed to provide the wife with suitable maintenance, or that she was justified in leaving him, would have led to a dismissal of the libel. The record was not supplemented with other evidence. In *Russell v. Place*, 94 U. S. 606, 608, the supreme court said, "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." To the same effect, see *DeSollar v. Hanscome*, 158 U. S. 216, 221; *McCarty v. Lehigh Valley R. Co.*, 160 U. S. 110, 120; *Prall v. Prall*, *supra*. In *Lea v. Lea*, 99 Mass. 493, 496, it was said that a decree dismissing a libel for a divorce which might have been entered upon the ground of either

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one of three sufficient defenses relied on by the libellee is conclusive between the parties as to neither of them. The rule cannot be applied as broadly as it is stated, however, and it does not apply in cases where it is immaterial upon what ground a judgment of dismissal was based for in such cases it may nevertheless operate as an estoppel though the ground was not disclosed. "Where the same issues are made and the same defenses are interposed in both actions, and there is no pleading or proof that any new determining issue, question, or matter is or may be involved in the second action, it is not material upon which defense or issue the former judgment was based, because an opposite judgment cannot be rendered without relitigating at least one defense and issue determined in the former action, and overruling the decision upon that defense which was there rendered." *Aetna Life Ins. Co. v. Bd. of Com'rs.*, 117 Fed. 82, 89. So far as the ground of failure to provide suitable maintenance as set up in the cross-libel is concerned, it is not material upon what ground the former libel was dismissed because if the libellant was unable to maintain her suit upon that ground at that time it will be presumed that she is unable to maintain it at this time, and no reason was made to appear why she should be permitted to relitigate in this suit any of the facts involved in the former suit as to that issue. But in connection with the ground of extreme cruelty under the cross-libel and the ground of desertion alleged in the libel of the husband it is material whether the question as to the husband's conduct toward and treatment of the wife was litigated and determined in the former suit, for if it was not, as both those grounds present new causes of action, the wife is entitled to be heard thereon, only such points as were actually decided being regarded as settled and foreclosed. *Cromwell v. County of Sac*, 94 U. S. 351; *Haw. C. & S. Co. v. Wailuku S. Co.*, 14 Haw. 50, 54. If the decree in the first case rested on the failure of proof of jurisdictional facts, or solely upon the ground that though the wife had left her husband he had continued to support her, the question

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as to the alleged misconduct and ill-treatment on his part, and her right to leave him because of it, has never been decided against the wife.

We hold, therefore, that though the decree in the former suit operates as a bar to the maintenance of the wife's cross-libel on the alleged ground of failure to provide on the part of the husband, it should not have been held, in the absence of proof showing that the fact that the wife was not justified in separating from her husband was determined by the former decree, to estop her now from showing extreme cruelty under her cross-libel or that she was justified in leaving him as a defense to the husband's accusation of desertion.

The decree appealed from is reversed and the cause remanded to the circuit judge.

A. D. Larnach for libellant.

C. C. Bitting (A. K. Ozawa with him on the brief) for libellee.

IN THE MATTER OF THE ESTATE OF DAVID
HENRY DAVIS, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED JANUARY 11, 1915.

DECIDED JANUARY 16, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EXECUTORS AND ADMINISTRATORS—*partial distribution—surcharging account.*

Where, prior to final settlement, an administrator, by *ex parte* petition, procures an order permitting him to distribute nearly all the funds in his hands, one-third to the widow, and two-thirds to a son, of the deceased, stating in his petition that they are the heirs of deceased, and makes such payments, after which another

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child of deceased, a daughter, appears and claims a distributive share in the estate, it is proper to surcharge the accounts of the administrator to the extent of one-half of the amount paid by him to the son.

OPINION OF THE COURT BY QUARLES, J.

June 10, 1912, the appellant was appointed administrator of the estate of David Henry Davis by order made by the second judge of the first circuit, sitting in probate, and qualified as such. October 10, 1913, appellant filed a petition praying for permission to make a partial distribution of the estate. In the petition appellant stated that he had on hand about \$4200, and that the sum of \$1200 would be sufficient to pay all claims against the estate not then paid, and costs of administration, and: "That the heirs at law of the said David Henry Davis are the minor child of the said David Henry Davis named James Kirkland Davis, and Jessie K. Davis his widow, and that Jessie K. Davis, widow of the said David Henry Davis, is the duly and legally appointed guardian of the estate of the said James Kirkland Davis." The petition closed with the following prayer: "And the petitioner now prays that he may be permitted at this time to make a partial distribution of the said estate of the said David Henry Davis, and to pay to the said Jessie K. Davis widow and heir the sum of \$1000 and to the said Jessie K. Davis as guardian of the said James Kirkland Davis the sum of Two Thousand Dollars, (\$2,000.00)." On the same day, October 10, 1913, the said circuit judge ordered as follows: "It is hereby ordered, adjudged, and decreed, that the said Ferdinand Hons be, and he is hereby permitted and allowed to make a partial distribution of the property of the said estate by paying to Jessie K. Davis as guardian of the estate of the said James Kirkland Davis, the sum of Two Thousand Dollars (\$2,000.00), and to Jessie K. Davis as widow and heir the sum of One Thousand Dollars (\$1,000.00)." June 5, 1914, appellant filed his partial account charging himself with receipts, and with disbursements including the sums of \$1000

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paid to the widow, and \$2000 paid to the guardian of James Kirkland Davis, showing a balance in his hands of \$507.82, which account he prayed be examined and approved. This partial account was referred to the master for examination and report, and the master made a report thereon, recommending among other things, the following: "The administrator, having on the 15th day of May, A. D. 1914, admitted in open court that Alma Eleanor Davis, of the City and County of San Francisco was a daughter and heir at law of David H. Davis, deceased, I respectfully recommend that he be surcharged with the sum of \$1000.00 being the share due to the said Alma Eleanor Davis, for and on account of the partial distribution, together with interest thereon at the legal rate from the 10th day of October, A. D. 1913." Thereafter and on September 8, 1914, the said circuit judge made an order surcharging the item of \$2000 made to the guardian in the sum of \$1000, from which order this appeal is prosecuted. During the hearing of the partial account, appellant, while testifying, admitted that he had heard that deceased had been married before, and had heard a rumor at the time of his appointment as administrator that the deceased had left another child surviving him, but said this rumor had not been confirmed to him, and he said nothing to the court about the rumor, and made no effort to ascertain its truth. There appears to have been a petition by Alma Eleanor Davis as an heir, and a verified answer thereto by appellant, but they are not in the record before us. We find in the transcript of the evidence the following admission made by Mr. Breckons, attorney for appellant, while speaking of an attorney fee paid him, and of the \$1000 surcharged: "Let it go over (the fee). If counsel wants that, we will pay it back without charges to the administrator. As to the thousand dollars matter we are willing to submit that as a matter of law on their petition and our sworn answer."

The only question before us is as to the correctness of the order surcharging the administrator with the one thousand dol-

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lars. It is urgently contended in his behalf that having the order of the court to make the payments he is fully protected, and that the other heir, Alma Eleanor Davis, must look to the guardian for her share of the \$2000 paid; that the proceeding was *in rem*, and the administrator having acted with authority from the court, he is protected in law, and cannot be surcharged with the \$1000. The circuit judge in passing upon the master's recommendation, treated the order for partial distribution as permissive only, as made upon *ex parte* application, without notice to Alma Eleanor Davis, for convenience of administrator, and considered that the administrator was negligent, at least in not informing the court of the rumor that he had heard as to a first marriage of decedent and probable issue of that marriage. Counsel for appellant says that in some jurisdictions probate proceedings are *in rem*, the property of the estate being the defendant represented by the administrator, and that all interested in the property are parties, while in others they are regarded as proceedings *in personam*. But in proceedings *in rem* parties interested in the *res* are entitled to notice—to an opportunity to be heard, and without such opportunity cannot be deprived of legitimate property rights. We know of no exception to this rule other than that applying to instruments of crime and articles the possession and use of which are prohibited by law, and which may, under statutory provisions, be seized and destroyed in a summary manner. Under well established rules in this jurisdiction it is immaterial whether the proceeding is called one *in rem*, or one *in personam*. An annual or intermediate accounting, such as the one here, had *ex parte* and without notice, is for the convenience of the administrator, is not final, but is subject to modification or annulment by the circuit judge sitting in probate, at any time before final distribution. The correct rule,—one which is generally followed in other jurisdictions, and which is decisive of this case, is enunciated in *Estate of A. Enos*, 18 Haw. 542, where the court, speaking through Mr. Justice Wilder, at page 546, said:

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"The practice in this Territory in probate matters is to require periodical accounts from an executor or an administrator * * *, and final accounts when the estate is ready to be wound up and the property distributed to those entitled. There is a clear distinction between the annual or periodical and the final accounts. The approval of the one is *ex parte* and without notice while in the case of the other it can only be made after notice to all concerned. The one is made annually or oftener at the discretion of the judge, the other only when the estate is fully administered. The one is for the information of the judge and the convenience of the administrator or executor in the management of the estate, the other is a final adjudication of the rights and obligations of all concerned. The one is only *prima facie* correct and is subject to correction for errors or mistakes in it thereafter discovered without an appeal or any direct proceeding to review it or set it aside, (see *Estate of Banning*, 9 Haw. 453, 457), the other is conclusive and final unless set aside on an appeal or a direct proceeding therefor or impeached for fraud. The approval of an annual account, being made without notice to any of the parties interested, is not conclusive as against one who does not appear, and in that sense it is not a final order, but, if a party interested does appear and objects and has a hearing on his objections and then appeals, the order is final as to such party, at least in the sense of its being appealable." See also 18 Cyc. 1194; *Holehua v. Kapu*, 4 Haw. 539; *Mikalemi v. Luau*, 6 Haw. 47.

In the case at bar Alma Eleanor Davis, admitted to be one of two surviving children of the decedent, did not appear, was not given notice, the order to pay the guardian of James Kirkland Davis was made *ex parte*, and on the same day the petition therefor was filed, hence she did not have the opportunity to present her claim as heir, and was not bound by the order permitting the payment. If an executor or administrator desires to be relieved of the responsibility of holding funds at any time prior to final accounting, on an *ex parte* proceeding, he must be certain to correctly inform the court as to the persons entitled to participate in the fund. Here, the administrator represented that the deceased left a widow and one child. He failed to.

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inform the court that he had heard that the decedent had been married another time and probably left a child surviving the first marriage. The court was misled by the actions of the administrator, who now asks that the child of the former marriage look to the guardian for half of the money that he has paid her, simply because, on his own petition as aforesaid, he induced the court to make the order. This would not be in the furtherance of justice, but in violation of the established rule in this jurisdiction. The order surcharging the administrator appealed from is affirmed, with costs to the appellee.

Affirmed.

R. W. Breckons for appellant.

R. B. Anderson and *A. M. Cristy* (*Frear, Prosser, Anderson & Marx* on the brief) for appellee.

THOMAS HOLSTEIN *v.* PAUL H. BENEDICT, ADMIN-
ISTRATOR OF THE ESTATE OF KELUPE SILVA,
DECEASED.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

SUBMITTED JANUARY 18, 1915.

DECIDED JANUARY 22, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*instructions—record on exceptions.*

The general rule applied, that on exceptions to instructions given or requests therefor refused, the charge given to the jury should be in the record

SAME—*writ of error—questions reviewable.*

Only errors of law apparent on the record are reviewable on error. Facts which do not appear in the record may not be brought to the attention of the supreme court by means of exhibits attached to briefs of counsel.

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CONTRACTS—*maintenance and services—members of family.*

Where maintenance and services are rendered between relatives living together as one household there is a presumption that they were intended to be gratuitous. In order to recover therefor the plaintiff must overcome this presumption by proving affirmatively either an express contract for remuneration or circumstances showing a mutual understanding or expectation between the parties that there would be compensation.

EVIDENCE—*scintilla—verdict.*

To amount to more than a scintilla the evidence must be of a character sufficiently substantial, in view of all the circumstances of the case, to warrant the jury, as triers of the facts, in finding from it the fact to establish which the evidence was introduced.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendant in error recovered judgment in the circuit court of the second circuit for the sum of \$158, and costs and attorney's fees, against the plaintiff in error in an action of assumpsit for maintenance and support furnished and services rendered, as it was alleged, to one Kelupe Silva, since deceased, of whose estate the plaintiff in error was the administrator.

Three of the assignments of error relate to the giving or refusing of certain instructions. These cannot be considered for the reason that the court's charge to the jury is not in the record. *Kaupena v. Kaio*, 20 Haw. 653, 655.

Another assignment questions the validity of the judgment on the ground that after verdict, but before judgment was entered, Benedict had been discharged as administrator and one Lufkin appointed in his place. It does not appear that those facts were brought to the attention of the court below. Counsel for the plaintiff in error has attempted to bring them before this court by attaching to his brief a certified copy of an order approving the accounts of Benedict, discharging him, and appointing Lufkin in his place. Facts which do not appear in the record may not be laid before this court in any such manner upon the expectation that they will be considered. Only errors of law apparent on the record are reviewable on error. *Vierra v. Hackfeld*, 8 Haw. 436; R. L. Sec. 1871. The action

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of counsel in attaching a copy of the order mentioned to his brief is disapproved.

The principal assignments of error go to the merits of the case and raise the question whether the verdict was supported by the evidence. Undisputed testimony showed that on the day of the death of her husband, June 13, 1912, Kelupe Silva went to the home of Thomas Holstein at Waikapu, Maui, and continued to live there until November 18, 1912; that Mrs. Silva was an elderly woman and suffered from asthma; and that she was the grand-aunt by marriage of Mrs. Holstein, plaintiff's wife. The plaintiff's claim was for one dollar a day as the reasonable value of the food and attendance furnished to Mrs. Silva by the plaintiff and his wife during the period stated. The plaintiff testified that he took care of Mrs. Silva believing that he would be paid by her in some way, though there was no promise on her part to pay any sum, and he never informed her that he intended to charge her anything. There was no evidence of any conversation between the plaintiff and Mrs. Silva with reference to her living at his home. Against the objection of the defendant the wife of the plaintiff testified to a conversation she had had with Mrs. Silva, as follows: "After she had lived with us a couple of months, one day I spoke to her: 'Perhaps it may be well for you to return to your own house now, we go and fix your house,' and she said, 'I hope you will be kind enough to let me stay with you—you will be paid some day.'" We may assume that the evidence was admissible either as part of the *res gestae* or as a declaration against interest, and that, if there was anything else in the case to support the plaintiff's claim, it might be regarded as of some probative force. But the question arises whether that testimony standing alone constitutes more than a mere scintilla of evidence to support the verdict, there being nothing else in the case to meet the principles of law applicable to cases of this kind. Those principles are stated in 15 A. & E. Enc. Law, 1083, et seq., thus: "Ordi-

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narily where services are rendered and voluntarily accepted, the law will imply a promise on the part of the recipient to pay for them; but where the services are rendered to each other by members of a family living as one household, there will be no such implication from the mere rendition and acceptance of the services. On the contrary, the presumption is that the services are intended to be gratuitous. and in order to recover therefor the plaintiff must affirmatively show either that an express contract for remuneration existed or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason for this is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will which tend to mutual comfort and convenience of the family; and the rule stated applies not only to members of a family who are related by blood, but to those distantly related, and to those who are in fact not related at all, provided they live together as members of one family. The presumption that services rendered by one member of a family to another were gratuitous is not a conclusive one. It may be overcome by showing an express agreement for payment, or by showing circumstances which will support the implication that the services were to be paid for. The burden is, of course, on the person rendering the services to overcome the presumption which the law raises that such services were rendered gratuitously." The case of *Luka v. Fyfe*, 4 Haw. 569, is in point, and it was there pointed out that the rule is peculiarly applicable to the hospitable habits of the Hawaiians. Mrs. Silva was a Hawaiian, and the plaintiff is part Hawaiian.

The burden was upon the plaintiff to prove by more than a scintilla of evidence either an express agreement, or circumstances, beyond the fact that the services were rendered, showing a mutual understanding or expectation that payment would be made for the services. An express agreement was not claimed.

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Did the statement of Mrs. Holstein constitute evidence from which a mutual understanding between the parties could reasonably be inferred? The cases are not in harmony on the point as to what constitutes a scintilla of evidence. "A mere scintilla of evidence, if it means anything, means the least particle of evidence—evidence which, without further evidence, is a mere trifle." *Offutt v. Columbian Exposition*, 175 Ill. 472, 476. "A scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror." *Crosby v. Seaboard, etc., Ry.*, 61 S. E. (S. C.) 1064, 1067. "Evidence may go beyond a mere scintilla, and yet not be substantial." *Jenkins v. Cement Co.*, 147 Fed. 641, 643. This court has held that the expression "more than a scintilla of evidence" means "some substantial evidence." *Robinson v. Rapid Transit Co.*, 20 Haw. 466. For illustrations of the application of the rule that a judgment must be supported by more than a mere scintilla of evidence, see *Richards v. On Tai*, 19 Haw. 451, 458; *Tyler v. Wise*, 21 Haw. 148, 153; *Scott v. Hawaiian Tobacco Plant.*, 21 Haw. 493, 497. In *Smith v. Hamakua Mill Co.*, 14 Haw. 669, 677, the evidence which was held not to amount to more than a scintilla was described as "very slight" and "very unsatisfactory." Each case must turn upon its own circumstances, and we are not prepared to say that in every case where, in the opinion of the appellate court, the evidence in support of a claim was very slight and unsatisfactory it is to be regarded as an insufficient foundation for a verdict. To amount to more than a mere scintilla the evidence must be of a character sufficiently substantial, in view of all the circumstances of the case, to warrant the jury, as triers of the facts, in finding from it the fact to establish which the evidence was introduced. In the case at bar the plaintiff, to prove his case, was obliged to overcome a rebuttable presumption which the law raises in this class of cases. The statement made by Mrs. Silva after she had been living at the plaintiff's

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home for two months, "I hope you will be kind enough to let me stay with you—you will be paid some day," was brought out by the suggestion of Mrs. Holstein that the time had come for Mrs. Silva to return to her own home. It clearly could not be construed as an admission that she had expected from the start to pay for the board and attendance rendered her, and, we think, could not reasonably be regarded as evidence of a mutual understanding between her and the plaintiff that she was to make compensation therefor from and after the time of the statement.

We are of the opinion that the verdict was not supported by more than a scintilla of evidence, and that it must be vacated. The case is remanded to the circuit court with instructions to set aside the judgment, to grant the defendant's motion for a non-suit, and to enter judgment thereupon for the defendant.

Enos Vincent for plaintiff in error.

E. R. Bevins for defendant in error.

TERRITORY OF HAWAII, BY J. W. CALDWELL,
SUPERINTENDENT OF PUBLIC WORKS, *v.*
PACIFIC COAST CASUALTY COMPANY, A COR-
PORATION.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. W. J. ROBINSON, JUDGE.

ARGUED JANUARY 7, 1915.

DECIDED FEBRUARY 1, 1915.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ASHFORD,
IN PLACE OF QUARLES, J., DISQUALIFIED.

PRINCIPAL AND SURETY—*contractor's bond—liability of surety.*

A surety on the bond of a contractor for a public work given to the Territory of Hawaii and conditioned that the contractor

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shall deliver the said work to the Territory, fully completed, free from all liens and claims, is not liable at the suit of the Territory for materials furnished to the contractor and used in the completion of the work, where the work is not subject to lien and the claims of the material-men could not lawfully be asserted against the Territory.

~~SAME—same—same.~~

Under Act 31, Laws of 1913, the Territory of Hawaii cannot maintain an action in its own name upon the bond of a contractor for the recovery of the value of materials supplied to the contractor in the prosecution of the work.

~~SAME—same—same.~~

Where the bond is for the faithful performance of the contract and the contract provides that the contractor shall "furnish all material necessary to complete the work" but does not in express terms bind him to pay for the same, the surety is not liable for the payment for materials furnished the contractor.

OPINION OF THE COURT BY WATSON, J.

On August 23, 1913, the Territory of Hawaii (defendant in error) and one F. M. Friesell entered into a contract by which Friesell agreed to lay a certain amount of six-inch galvanized iron water pipe near Kaimuki, city and county of Honolulu, for the sum of \$5655. The contract, so far as material, provided that the contractor should furnish all material (except manhole frames) and all labor necessary for the completion of the work and complete the same in a workmanlike manner to the satisfaction of the superintendent of public works and in accordance with plans and specifications. The Territory agreed to pay eighty per cent. of the value of the materials used and work done during the preceding month as the work progressed. The remaining twenty per cent. was made payable upon the acceptance of the work by the superintendent of public works. To secure the faithful performance of the contract the contractor furnished a bond signed by the plaintiff in error, the Pacific Coast Casualty Company, as surety, which, so far as material, bound it unto the Territory of Hawaii and its successors in the sum of \$1415, and provided that the condition of this obligation is such that

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"Whereas, the above named principal (Friesell) has this day entered into an agreement with the above named Territory of Hawaii through J. W. Caldwell, its superintendent of public works, to furnish all the labor, material, equipment, tools and machinery necessary to complete the laying of 6" galvanized iron water pipe at Kaimuki, Honolulu, Territory of Hawaii.

"Now, therefore, if the above named principal shall in all things well and truly keep, observe and perform the said agreement and each and every covenant, condition and promise therein contained on his part to be kept, observed or performed and shall promptly pay all just claims for all labor and materials furnished to him and used in the prosecution of the work, and shall deliver the said work to the said Territory of Hawaii or to its successors fully completed as in said agreement specified, free from all liens and claims and without further cost, expense or charge to the said Territory of Hawaii or to its successors in office than is agreed to or provided for in said agreement * * * then the above obligation shall be void, otherwise it shall be and remain in full force and virtue."

Before the work was completed Friesell abandoned the contract and the Territory completed the laying of the pipe. This contingency was provided for in the contract as follows:

"Should the contractor at any time fail to carry out the work as specified and as shown on the plans, the superintendent of public works may declare the contract terminated, so notify the contractor and thereupon enter said work, use all the tools, machinery and appliances, the property of the contractor, or such as may have been used by him, and complete the work, charging the cost of same against any moneys held in reserve or belonging to the contractor or that may be due for any work performed; and if such moneys are not sufficient to complete the work, the bondsmen shall be held liable for the excess of any moneys so expended above the contract price."

Presumably the cost of completing the work was charged against the contract and deducted from the money held in reserve belonging to the contractor, as, although it is alleged that Friesell did not complete the work and abandoned the contract when it was uncompleted and the Territory was compelled to complete the same, it is not made to appear that the Territory

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sustained any damage thereby, nor is any claim made against the defendant therefor. Upon the completion of the work the Territory was indebted to Friesell in the sum of \$1395.50, and Friesell was indebted to various material-men in the sum of \$1682.88, claims for which against Friesell were filed in the office of the superintendent of public works. As to these claims and the amount remaining due Friesell under the contract it is stipulated in the agreed statement of facts as follows:

"That there has been paid upon the contract pursuant to its terms the sum of \$4259.50 and that there still remains unpaid thereon the sum of \$1395.50.

"That there have been filed claims against the defendant F. M. Friesell, contractor, in the sum of \$1682.88, which said claims are hereby admitted by the Pacific Coast Casualty Company to be valid and copies of which are attached to plaintiff's complaint. The claims are for materials furnished the defendant Friesell and used by him to complete the contract."

This suit is brought on the bond, by the Territory of Hawaii, the obligor named in the bond, to recover \$287.38, the amount due material-men in excess of the amount due from the Territory under the contract. No service was had upon the defendant Friesell and no appearance was entered by him in said action. The case was tried in the lower court, jury waived, upon an agreed statement of facts. The trial court found "that the bond upon which this suit is predicated is conditioned so that the principal 'shall deliver said work to the said Territory of Hawaii or its successors fully completed, as in said agreement specified, *free from all liens and claims and without further cost, expense or charge to the said Territory of Hawaii or to its successors in office than is agreed to or provided for by said agreement.*' The facts show that the contractor did not deliver the work to the Territory of Hawaii or to its successors fully completed, free from all liens and claims, but on the contrary there were claims to the amount of \$287.38 in excess of the amount due upon the contract, and the court finds that the surety is liable upon its bond therefor." Judgment was accord-

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ingly entered in favor of the plaintiff (Territory of Hawaii) to recover of the defendant, Pacific Coast Casualty Company (plaintiff in error here), the sum of \$287.38 together with interest and costs of court, to reverse which the record has been removed to this court by a writ of error.

We cannot agree with the trial court that the plaintiff in error is liable on the stipulation contained in the bond signed by it as surety that the contractor shall "deliver the said work to the said Territory of Hawaii or to its successors fully completed, as in said agreement specified, free from all liens and claims," etc. It is conceded by the defendant in error that the pipe line is a public work; that the material-men were not entitled to liens and that their claims could not lawfully be asserted against the Territory. It is urged, however, by counsel for the Territory that the Territory is morally bound to pay the claims of the material-men for materials furnished the contractor and actually used in the work, and it is said that in a case similar to the one at bar the legislature of the Territory has recognized such moral obligation by making appropriations out of the public funds to pay material-men for materials furnished to a contractor and used by him in the construction of a public building—the contractor having failed to pay for the same. With such considerations the courts have no concern. There is no principle of law better settled than that a surety has the right to stand upon the very terms of his contract. And the liability of the plaintiff in error in this case can in no wise be affected by the fact, or conjecture, that the legislature *may*, in a spirit of mistaken generosity, or whatever its motive may be, take the view that the Territory is morally obligated to pay these claims and make an appropriation therefor. Suffice it here to say that such claims are not enforceable either at law or in equity against the Territory. Not only is this the general rule of law with respect to the enforceability of material-men's claims against public contracts, but in the instant case the contract expressly provides that "the Territory will not be respon-

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sible for any * * * material furnished except on written order of the superintendent of public works." The claims of the material-men which have been filed in the office of the superintendent of public works, and copies of which are attached to plaintiff's declaration, are all made out against F. M. Friesell, the contractor, and none of them, so far as the record discloses, have been asserted, nor has it been attempted to assert the same, against the Territory, or against the work. It is well settled, on principle and authority, that sureties on bonds to secure against liens or claims on property are not liable thereon unless liens or claims are made against it. *Smith v. Bowman* (Utah), 88 Pac. 687, 9 L. R. A. N. S. 889, and numerous authorities cited in case note 9 L. R. A. N. S. 889. In *Alcatraz Masonic Hall Assn. v. U. S. Fidelity & Guaranty Co.* (Cal.), 85 Pac. 156, 158, the court said: "The contract with the plaintiff on the part of Grant (the contractor) to deliver the building free from all liens, claims and demands is to be construed as limited to such liens and demands as can be enforced against the building * * * and the obligation of the defendant as surety for Grant has the same limitation. Unless the plaintiff has been compelled to pay a greater sum of money to free the building from the liens than the unpaid amount of the contract price for its construction it has suffered no damage." The Territory under this stipulation in the bond has no claim against the surety, because it has suffered no loss and has sustained no injury by reason of the failure of the contractor to pay the claims of the material-men. *Elec. Appliance Co. v. U. S. Fidelity & Guaranty Co.* (Wis.), 53 L. R. A. 609, 612. We will proceed to examine the other stipulations in the bond, and ascertain whether the plaintiff in error may be held liable thereunder in this action. The statute under which the bond in this case was executed (Act 31, Session Laws, 1913), entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works," provides that the bond contemplated by it, to be given by the contractor, shall be condi-

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tioned for the due and faithful performance of the contract and also for the prompt payment to all others for all labor and materials furnished by them to him and used in the prosecution of the work provided for in such contract. The condition of the bond given is substantially that required by the statute. The fact that the bond contains a further undertaking that the contractor shall deliver the said work to the said Territory of Hawaii or to its successors fully completed as in said agreement specified, free from all liens and claims, etc., does not take the bond out of the statute. *Board of Education v. Grant*, 107 Mich. 151, 154.

It will be seen by reading the two statutes that Act 31 aforesaid, so far as material, is copied almost verbatim from the Act of Congress of August 13, 1894 (28 Stat. 278), as amended February 24, 1905 (33 Stat. 811). The federal enactment has been frequently before the courts (See 6 Fed. Stat. Ann. pp. 125, et seq.), and in the case of *United States to Use of Edward Hines Lumber Co., v. Henderlong, et al.*, 102 Fed. 2, an action brought by a material-man against a contractor and the sureties on his bond to recover the value of certain materials furnished the contractor and used by him in the construction of a postoffice building for the United States, the court said (p. 4): "The right of action created by the bond in favor of laborers and material men is exclusively vested in them by the statute. They alone are authorized to bring the suit and to prosecute the same to final judgment and execution. The United States have no interest, either directly or indirectly, in the controversy. * * * *The United States, as sole plaintiffs, could not maintain a suit in their own name upon the bond for the recovery of the value of labor or materials supplied to the contractor in the prosecution of the work.*" Again, in the case of *United States v. National Surety Co.*, reported in 92 Fed. 549, the circuit court of appeals for the eighth circuit, speaking through Circuit Judge Thayer, said (p. 551): "The Act of Congress of August 13, 1894, does not authorize the United States to

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bring suits of its own motion against the obligors in such bonds as are therein provided for, to recover what is due to laborers and material-men. It is not empowered to act in their behalf in that respect, but such actions can only be brought at the instance of persons who furnish labor and materials, who are authorized, without previous leave being obtained from any executive department, to sue in the name of the United States, and control the litigation precisely as they might control it if the suits were brought in their own name. * * * The bond which is provided for by the act was intended to perform a double function,—in the first place, to secure to the government * * * the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience." See also *City of Bethany v. Howard*, 149 Mo. 504. Where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or country or by that of another, that construction is to be given to the later statute. *Commonwealth v. Hartnett*, 3 Gray 450; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *Rigg v. Wilton*, 13 Ill. 15; *Adams v. Field*, 21 Vt. 256. It is to be presumed in such case that the legislature which passed the later statute knew the judicial construction which had been placed on the former one and such construction becomes a part of the law. Potter's Dwarrris Stat., 274.

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There remains but one other condition in the bond to be considered,—the first,—which is for the faithful performance of the contract. As we have seen, the contract provides that the contractor shall furnish all material and labor necessary to complete the work. But as it does not in express terms bind him to pay for the materials that provision of the bond does not cover the amounts due material-men and would not authorize the Territory to sue upon the bond to recover such amounts or any part thereof. *Wolf v. City of Sterling*, 61 Ill. App. 515, 521, affirmed on appeal, 163 Ill. 467; *Puget Sound Brick Co. v. School District* (Wash.), 40 Pac. 608; *Searles v. City of Flora*, 225 Ill. 167, 171. We are of the opinion that under the pleadings and evidence in this case no breach of the bond has been shown which would entitle the Territory (defendant in error herein) to recover in this action.

In view of our conclusion that the Territory has no right to maintain this action we do not find it necessary to discuss the application of the doctrine of *strictissimi juris* as applied to compensated sureties on a bond, or whether the surety in this case was released from all liability under the bond by reason of certain alleged alterations in the work and extensions of time granted the contractor without notice to or the consent of the surety.

It results from what has been said that the judgment of the circuit court was erroneous and should be reversed. It is so ordered, and judgment will be entered in this court for the plaintiff in error (defendant below).

R. J. O'Brien (*E. C. Peters* with him on the brief) for plaintiff in error.

L. P. Scott, Deputy Attorney General (*I. M. Stainback*, Attorney General, with him on the brief), for the Territory.

Hackfeld & Co. v. Yamamoto, 22 Haw. 455.

H. HACKFELD & COMPANY, LIMITED, v. K. YAMAMOTO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED FEBRUARY 8, 1915.

DECIDED FEBRUARY 16, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*evidence to support findings.*

A finding by the trial court that certain goods had been sold to and upon the credit of a partnership, which was based upon the direct testimony of a witness to that effect, ought not to be set aside as being against the evidence merely because it appeared that the account had been kept on the plaintiff's books in the individual name of one partner and the goods were billed and shipped in that name.

PARTNERSHIP—*limitation upon authority of partner.*

Restrictions on a partner's authority do not affect third persons who deal with the firm without notice of them.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendant appealed to the circuit court, jury waived, from a judgment entered against him in the district court of Honolulu in an action of assumpsit for goods sold and delivered. Trial in the circuit court resulted in a judgment for the plaintiff, and the case is here upon the defendant's exceptions to the decision and judgment as being contrary to the law and the evidence and to certain rulings relating to the admission of evidence introduced by the plaintiff.

The complaint alleged that "the plaintiff did deliver to the defendant certain goods, wares and merchandise at his, said defendant's, special instance and request," as shown by sworn statement attached, the unpaid balance of account being \$186.83. The statement attached to the complaint contained items covering a period from June to December 1913. At the trial the defendant admitted that "the goods, wares and mer-

chandise described in the complaint herein were, on the dates set out in the schedule thereto attached, sold to C. H. Eichler and delivered to C. H. Eichler (at) the said Castner Boarding House, the agreed price thereof being the sum of \$186.83, as alleged in the complaint herein." A written agreement of partnership between the defendant and Eichler was filed in evidence. It was dated April 25, 1912, and provided for the carrying on of a boarding house business at Castner station, Schofield Barracks, and the parties agreed "to start" a cigar store and billiard parlor. The parties also agreed to provide capital in equal shares; Eichler was to manage the boarding house, and was to send "all orders" to Yamamoto who was to do the buying without commission. The goods in question were purchased of the plaintiff in Honolulu, and there was evidence to the effect that they were of a character such as would be used in a restaurant and cigar store, and that they were sent by railroad consigned to Eichler at Castner station. It further appeared in evidence that the goods were charged upon the books of the plaintiff to C. H. Eichler and were billed in his name; that the defendant did not know that Eichler had made the purchases; that Eichler had died, and no demand had been made on the defendant with reference to the payment of the account until some months after his death. An employee of the plaintiff testified that when Eichler arranged for the opening of the account he stated that he was in partnership with Yamamoto in the boarding house business; that that had been confirmed by the defendant himself; and that the goods were shipped "to the boarding house account." The court below found that the goods "were purchased for and on behalf of the copartnership existing between the defendant K. Yamamoto and C. H. Eichler, that said purchases were within the scope of the partnership so existing and that the credit given by the plaintiff herein was given to said copartnership and not to Eichler as an individual," and that the "purchases were purchases by the copartnership and the delivery was to the copartnership." Counsel for the

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defendant contends that the evidence did not support the finding of a sale to the partnership inasmuch as the proofs showed that the goods had been charged and billed in the name of C. H. Eichler. Those circumstances were open to explanation, however, and there was sufficient evidence in the case to warrant the court in finding as it did. On the assumption that the evidence showed only a sale to Eichler individually it is urged that the evidence did not support the allegation of a sale and delivery to the defendant. The point would have been well taken if the evidence was as claimed, but the fact was found otherwise by the trial court. The partnership not having been registered in accordance with the statute the defendant was individually liable for all the debts of the firm. R. L. Sec. 2658. The defendant was also severally liable as a surviving partner, and counsel makes no contention that the allegation of the complaint would not be supported by proof of liability on the part of the defendant as the surviving partner of the firm. There was no evidence that the plaintiff had notice of the provision in the partnership agreement that all the buying was to be done by Yamamoto. It is immaterial, therefore, that the goods in question were purchased by Eichler and without the defendant's knowledge. Restrictions on a partner's authority do not affect third persons who deal with the firm without notice of them for the implied power of a partner is determined by the apparent scope of the partnership business. 30 Cyc. 481; *Kimbrow v. Bullitt*, 22 How. 256, 266. The claim that the decision and judgment were against the law and the evidence is not sustained.

The evidence of a witness who, shortly before Eichler's death, had made an inventory of the stock on hand was properly admitted as part of the plaintiff's case as tending to show that the goods in question were such as were used in the business and that, therefore, the purchases were within the scope of the business of the partnership. And the testimony as to the statement made to Hackfeld & Company by Eichler that he was a partner with the defendant in the Castner Boarding

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House was admissible in connection with the point that although the account on the books of the plaintiff was in the name of Eichler the credit had in fact been extended to the partnership.

The exceptions are overruled.

W. B. Lymer (Thompson, Wilder, Milverton & Lymer on the brief) for plaintiff.

Lorrin Andrews for defendant.

CONCURRING OPINION OF QUARLES, J.

I concur in the conclusion in this case, but in doing so do not desire to be considered as regarding the evidence upon which the findings of the trial court is based as being within the issues made by the pleadings. In my opinion the complaint should have alleged the partnership, the survival of the defendant, and a sale and delivery to the partnership. However, the failure of the defendant to raise this question, and his stipulation of the facts shown by the record, may be treated, after judgment, as curing the failure to allege the partnership, sale and delivery thereto, and survival of the defendant; and, as having waived the question.

The defendant contends that the evidence does not show a delivery of the goods sold by plaintiff to the partnership, and therefore the judgment is against law and the evidence. In my opinion the circumstances proven by the evidence are sufficient to justify, in the absence of evidence to the contrary, the finding that the goods were sold and delivered to the partnership. The partnership had one business, and one place of business, a boarding house at Castner; the goods were shipped to Eichler at Castner; there is no evidence tending to show that Eichler was interested in any other business, or used the goods for his own personal benefit.

Scott v. Stuart, 22 Haw. 459.

IN THE MATTER OF THE APPLICATION OF M. F. SCOTT AND NETTIE L. SCOTT FOR A WRIT OF PROHIBITION AGAINST HONORABLE T. B. STUART, CIRCUIT JUDGE, FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII, AND JOSEPH LIGHTFOOT, ESQ., MASTER IN CHANCERY.

PETITION FOR WRIT OF PROHIBITION.

ARGUED FEBRUARY 17, 1915.

DECIDED FEBRUARY 25, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EQUITY—*jurisdiction—master in chancery.*

It is the usage and practice of courts of equity to refer causes to a master in chancery with directions to hear evidence, and to report findings of fact, and such other matters pertinent to the cause of which the court should be advised, and the power to do so has not been abrogated by section 1648, R. L., but is recognized by section 1834, R. L.

PROHIBITION—*want of jurisdiction.*

The writ of prohibition will not lie to prevent a master in chancery from proceeding under a reference made in an equity suit, the circuit judge sitting at chambers in equity having jurisdiction to order the reference, as it is only in case of want of jurisdiction that this writ will lie.

OPINION OF THE COURT BY QUARLES, J.

The petitioners, M. F. Scott and Nettie L. Scott, filed their petition, in this court, praying that a temporary writ of prohibition issue prohibiting the respondent Lightfoot from proceeding as master in chancery under orders made at chambers by the respondent Stuart, as third judge of the first judicial circuit, in a partition suit wherein the petitioners are the plaintiffs, and more than one hundred persons are defendants, on the ground that the appointment of such master was made without jurisdiction; and, praying that on final hearing the writ

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be made perpetual. The order prescribing the duties of the master is as follows:

"This cause coming on for final disposition this 28th day of January, 1915, M. F. Scott, one of the plaintiffs, appearing in person, and W. A. Greenwell, Esq., of the Firm of Castle and Withington, solicitors appearing for J. B. Castle and certain other defendants, and Eugene K. Aiu, Esq., appearing for E. N. Pilipo, a defendant, the court being advised from the pleadings and files in this cause that this cause was begun by bill of complaint filed September 3, 1897; that during the seventeen years which have elapsed since the filing of the bill various proceedings have been had herein, among which have been the filing of reports of commissioners, motions by parties to the cause and their solicitors, and partial decrees and interlocutory orders by the court, the result of which is nothing but a maze of uncertainty, not only as to the effect thereof, but as to the present status of the cause, and it further appearing to the court that it is doubtful if all of the original 142 parties defendant named in the bill or their grantees owners of the lands sought to be partitioned in North Kona on the Island of Hawaii, known as Holualoa 1, and 2, 7330 acres in extent, the Hui Aina O Holualoa divided into some 350 shares or undivided interests, are now within the jurisdiction of the Court, some of them never having been served by process or having submitted themselves voluntarily to the jurisdiction of the Court and no substituted service by publication having been made, and it further appearing that claimants of interests in said lands are in possession and occupation thereof and others are not, and that certain persons not parties to the cause have been collecting rents in large amounts by virtue of certain claims of the ownership of interest in the said lands, and it further appearing that the parties this day before the court are not ready to proceed and no suggestion being made by them as to what steps remain to enable the court to make final disposition of this cause, the court deeming this cause, because of its intricacies, one which should receive a thorough investigation by a Master in Chancery, and a report thereon from such Master, the Court hereby appoints A. F. Judd, an Attorney at Law of this Bar, as Master in Chancery herein, and orders him to fully investigate and report upon the record herein; to take such further evidence

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as any parties may see proper to introduce and ascertain and report if all owners of said land have been made parties hereto, and if all persons claiming an interest therein and receiving lands therefrom as such claimants have been made parties, and to take all evidence that may be offered by any of the parties in reference to the matters embraced in said cause, and report said findings and his conclusions of law and of fact in reference to the same, and do and perform all things that might be done and performed by final decree as said Master may recommend to be entered.

"The Court doth empower said Master in Chancery to exercise all powers that are usually exercised by Masters in Chancery, fixing the date or dates of hearings, and notifying the parties to be present and enter upon hearings and make note of any failure to obey his directions or orders in the premises, and report the same to the Court; that the said Master in Chancery shall proceed as speedily as possible in the said matters and shall file the report of his doings as aforesaid within sixty days from this date or give sufficient excuse for not so doing.

"That before entering upon the duties herein placed on said Master in Chancery, he shall file the customary oath with the Clerk of this Court to well and truly perform his duties according to law under the orders herein given and powers herein conferred upon him and those appertaining generally to such an appointment.

"(Sgd.) T. B. Stuart

"Third Judge, Circuit Court of the
First Judicial Circuit, Territory of Hawaii."

Mr. Judd declined the appointment, and the respondent Lightfoot was appointed master in his place and stead to act as in said order prescribed. The temporary writ issued to which the respondents have made return. No material fact is in issue, the material facts being substantially as recited in the order above quoted. At the hearing the petitioners contended that there is no authority, statutory or otherwise, in this jurisdiction, authorizing the reference of the said partition suit to a master; and, that the provisions of Sec. 1648, R. L., wherein jurisdiction is conferred to "hear and determine all matters in

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equity," withhold from the circuit judge, sitting in equity, the power to appoint masters in chancery. The following authorities are cited by petitioners as sustaining their contention: *Hobart v. Hobart*, 45 Iowa 501; *Kimberly v. Arms*, 129 U. S. 524; *Commonwealth v. Archbald*, 195 Pa. St. 318; and Beach on Modern Equity Practice, Sec. 673.

In our opinion the authorities cited do not support the contention of the petitioners. *Hobart v. Hobart*, 45 Iowa 501, was a divorce case; Iowa had a statute prohibiting the granting of divorces except upon hearing in open court; it was held error to appoint a referee to take evidence and report the facts. In *Kimberly v. Arms*, 129 U. S. 512, a special master was appointed by consent of the parties to hear and determine all issues in the case, both of law and fact. The court refused to confirm the report of the special master, ignored it, heard the evidence and decided the case. On appeal the Supreme Court reversed the judgment upon the ground that the report of the special master should have been confirmed. In *Commonwealth v. Archbald*, 195 Pa. St. 318, a bill for accounting and final settlement was filed, and a decree for accounting entered, whereupon the matter was referred to a master to state the account between the parties; petitioners, after an account had been stated, sought, by mandamus, to compel the court below to hear the evidence and state the account, relying upon a rule of court, theretofore adopted, discounting the office of master in chancery, except in certain cases; the petition for the writ was dismissed and the writ denied, the court saying, *inter alia*: "But the office of master though 'discontinued' with reference to its general use in the then existing practice was not abolished. It is a necessary part of the equipment of a court of chancery, extending back at least to the time of Edward the third." Section 673, Beach, Mod. Eq. Prac., cited, merely points out rules announced in the decision in *Kimberly v. Arms*, *supra*. In the preceding section (672) Mr. Beach says: "When the question arises on a bill for partition as to the undivided rights and inter-

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ests of the parties, the usual course is to direct a reference to a master to enquire and report."

The last clause in section 1834, R. L., relating to the jurisdiction of circuit judges at chambers, provides: "And shall have full equity jurisdiction according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law." It has been the "*usage and practice* of courts of equity," from time immemorial, to call to their aid the service of a master to hear evidence and report to the court for its information findings of fact, and the status of a cause wherein the parties are numerous and the pleadings are prolix, and our statutes have not sought to take this power from courts of equity; but, on the other hand to recognize the power in such courts to follow the usual equity practice. "The most frequent purpose of a reference is to take testimony and report to the court for its information with reference to some fact or groups of facts incidental to the main questions involved, but essential to be determined in order to frame a final decree. Besides the taking of accounts, the assessment of damages, and the determination of titles, many other matters not susceptible of ready classification or even enumeration may be conveniently determined in this way." (16 Cyc. 436.) "The duties of masters are various, and difficult to be specified; for there is no question of law or equity or disputed fact or facts which a master may not have occasion to decide upon, or respecting which he may not be called upon to report his opinion to the court. And it would be tedious to specify every head of reference to a master, because they are almost as numerous as the matters subject to the jurisdiction of the court itself." (17 Enc. Plead. & Prac. 984.) "In an action which is equitable in its nature the court may refer all the issues of fact to the master without the consent of the parties, and it need not refer the cause only to take testimony and report the same to the court." (17 Enc. Plead. & Prac. 986.)

The power of a circuit judge at chambers, sitting as a chan-

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cellor in an equity case, to refer a partition suit, under the circumstances stated in the order in question, is one resting in his discretion. Jurisdiction to make the said order exists; if the order be erroneous, a question that we do not decide, prohibition is not a proper remedy and lies only when jurisdiction does not exist. The circumstances cited in the order show, if not a necessity for making the reference, at least good reason for making it. In arguing the question it was admitted on behalf of the petitioners that there are nearly one hundred and fifty pleadings in the case, and numerous interlocutory decrees and orders, some of which have been annulled, others executed, and that it would take a stranger to the record not less than two weeks to familiarize himself with the present status of the partition suit. The language of the order setting forth the duties to be performed by the master is very broad, but on the whole it is apparent that its object is to relieve the court, and have the labor of ascertaining what defendants are now before the court; what defendants should be brought before it; of ascertaining the various interests of the respective parties, performed by the master, and to have him report such final decree as he may recommend to be entered, such decree to be made by the circuit judge, and not by the master. If the language in the order "and do and perform all things that might be done and performed by the court itself in the trial of said cause," be regarded as relating to the procedure to be had before the master, such as swearing witnesses, compelling their attendance, hearing their evidence, and reporting proposed findings of fact and conclusions of law, and the manual preparation of such decree as the master deems shall be proper in the cause, for the consideration of the circuit judge, to be adopted or rejected by him, there is no delegation of jurisdiction by the circuit judge to the master. However, we do not construe the language of the order, but do hold that the respondent, Stuart, as circuit judge, had jurisdiction to make the order, and that this is not a proper case, under Sec. 2083, R. L., for the writ of prohibition.

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Let judgment be entered discharging the temporary writ of prohibition which heretofore issued in this proceeding, dismissing this proceeding, and awarding to the respondents their costs herein incurred.

M. F. Scott for petitioners.

J. Lightfoot for respondents.

FRED HARRISON v. ROBERT WYLLIE DAVIS.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED FEBRUARY 11, 1915.

DECIDED MARCH 4, 1915.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD
IN PLACE OF WATSON, J., DISQUALIFIED.

QUIETING TITLE—*statutory action—title in stranger.*

In an action to quiet title where the plaintiff has adduced evidence of title a defendant who has no title may not defeat the plaintiff's case by showing that one not a party to the action has a title superior to that relied on by the plaintiff.

TRUSTS—*alienation of equitable interest—object of trust.*

The right of alienation is not a necessary incident to an equitable interest to income or support for the life of the beneficiary, and it does not exist where it would be destructive of the trust or is incompatible with its purposes though there be no express prohibition against alienation.

OPINION OF THE COURT BY ROBERTSON, C. J.

This case was previously before this court on exceptions brought by the plaintiff. Ante, p. 51. As stated in the former opinion, the plaintiff seeks to have quieted as against the defendant his claim of title to an undivided one-half of the land of Mokapu, Island of Oahu, for a term of years which was

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demised originally by Holt, trustee, to one Gear, by an indenture dated June 1st, 1910. The common source of title under which these parties claim is a trust deed executed by John K. Sumner on August 16, 1892, the substance of which was set forth in the former opinion.

At the trial of an action to quiet title under the statute (R. L. Ch. 132) it is incumbent upon the plaintiff to prove a title in or to the land in dispute, and, if he fails to do so, it will be unnecessary for the defendant to make any showing. In case each party adduces evidence of title and it appears that the claims are adverse the court will decide between them, but the defendant may not defeat the plaintiff's case by showing that although he has no title in himself, one who is not a party to the action has a title superior to that relied on by the plaintiff.

When this case was last before this court the judgment of non-suit theretofore entered in the circuit court was set aside. It was held that the deed of trust created an active trust; that the legal title to the land remained in the trustee and had not been executed by the statute of uses; and that the written consent and confirmation of the lease from the trustee to Gear, given by the defendant, operated as a waiver of his right to occupy and use the land pursuant to the provisions of the deed of trust. Upon the resumption of the trial in the circuit court the defendant introduced in evidence, over the objection of the plaintiff, a warranty deed dated January 1, 1906, executed by the defendant, purporting to convey to John K. Sumner "all my one-half undivided share or interest" in the land of Mokapu, and a mortgage by the defendant to Sumner of "all my undivided one-half share and interest" in Mokapu, dated January 2, 1906. This evidence was afterwards held to be inadmissible and was stricken out on the ground that it could tend to show no more than that possibly there was a title in a stranger. The ruling was correct. Another point made by the defendant is that by reason of a certain admission made at the trial by

counsel for the plaintiff the plaintiff could not recover, in any event, more than an undivided one-fourth of the premises. The record shows that the plaintiff's counsel said "We admit that Robert Wyllie Davis took a half of our term of years, 25 term of years." The statement, if correctly reported, was not happily phrased, but what counsel meant evidently was that the plaintiff admitted that the defendant owned a half interest in the term demised to Gear. That must have been the understanding of the trial court, and, we are satisfied, that was the proper view to be taken of it. The circuit court held that the defendant had not rebutted the *prima facie* case previously made by the plaintiff, and judgment was entered declaring and confirming the plaintiff's ownership and right to possession of an undivided one-half interest in the land in question for a term of years, to wit, until June 1, 1935.

Counsel for the defendant (now plaintiff in error) contend that the lease from Holt, trustee, to Gear was a nullity and passed no interest in the land because, (1) the Sumner trust deed created a mere passive trust which, by the statute of uses, vested the legal title in the beneficiary, and (2) because, even if the trust was an active one, the defendant's equitable interest was assignable, both as to the rents and profits of the land and as to the right of residence and use, which said interest the defendant had conveyed by deed and mortgage to Sumner, as above stated, prior to the execution of the Gear lease, and Sumner had entered into possession of the land under one or both of those instruments. There was a question as to whether or not the evidence showed that Sumner was still in possession on the date of the lease to Gear, but in the view we take of the matter that would be immaterial. We are satisfied that the ruling heretofore made by this court that the trust deed from Sumner to Cartwright created an active trust was correct for the reasons stated in the former opinion. The trust deed did not expressly prohibit the assignment by Davis of his right to the rents. It seems to be conceded, and we may assume, that he could make

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a valid assignment of the rents and that the conveyances to Sumner were effectual to pass to the grantee the right to receive rents collected by the trustee. *McCandless v. Castle*, 19 Haw. 515, 518. But could he assign his right to "reside upon said premises and while so residing to use the same for grazing or agricultural purposes"? The clear weight of authority in the United States is to the effect that a trust may be created under which the beneficiary may be entitled to receive an income which he cannot anticipate by assignment and which is free from the claims of creditors, and it is held that the right of alienation is not a necessary incident to an equitable interest to income or support for the life of the beneficiary. It is also held that the right of alienation of such an interest does not exist where it would be destructive of the trust and incompatible with its purposes though there be no express prohibition. 39 Cyc. 236; *Perkins v. Hays*, 3 Gray 405, 409; *Baker v. Brown*, 146 Mass. 369, 371; *Seymour v. McAvoy*, 121 Cal. 438, 442; *Mattison v. Mattison*, 53 Ore. 254, 259; *Barnes v. Dow*, 59 Vt. 530, 543; *First Nat. Bank v. Trust Co.*, 62 S. W. (Tenn.) 392, 399; *Monday v. Vance*, 51 S. W. (Tex.) 346, 349; *Roberts v. Stevens*, 84 Me. 325; *Bennett v. Bennett*, 217 Ill. 434, 442. We hold that under the deed of trust here involved the right of Davis to occupy and use the land for certain purposes was personal to Davis and did not extend to his assigns. This was the intention of the donor as we gather it from the deed. The object was to provide and secure for the defendant either a home and an opportunity to make a living out of the land, or an income, as he might elect to take. A right to assign the right of occupancy would be incompatible with that object and we must give effect to the apparent intention of the donor in this respect even though the right to assign the income was not restricted. The defendant having waived his right to occupy the premises, the lease to Gear was valid and operative, and its validity was not affected by the conveyances made by the defendant to Sumner.

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Our conclusion is that the judgment of the circuit court was in accordance with the law and the evidence, and it is affirmed.

R. J. O'Brien (*E. C. Peters* with him on the brief) for plaintiff in error.

W. B. Lymer (*Thompson, Wilder, Milverton & Lymer* on the brief) for defendant in error.

CHARLES H. ROSE *v.* THE HONORABLE CLARENCE
W. ASHFORD, FIRST JUDGE OF THE CIRCUIT
COURT OF THE FIRST JUDICIAL CIRCUIT, TER-
RITORY OF HAWAII.

PETITION FOR WRIT OF PROHIBITION.

ARGUED MARCH 1, 1915.

DECIDED MARCH 4, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CONTEMPT—*procedure in cases of constructive contempt—formal complaint.*

In cases of constructive contempt where the facts constituting the alleged offense do not appear of record and are not evident to the court it is necessary to give the court jurisdiction to proceed against the contemnor that a formal affidavit, complaint or information stating the facts be filed as a basis upon which an order to show cause or attachment may issue.

PROHIBITION—*contempt proceedings—void order.*

A writ of prohibition may be had to restrain the enforcement of a void order by a circuit court or judge through contempt proceedings though the question of jurisdiction was not first raised in the court below.

OPINION OF THE COURT BY ROBERTSON, C. J.

Upon the petition of Charles H. Rose a writ of prohibition was issued against Hon. C. W. Ashford, first judge of the circuit court of the first circuit, restraining him from proceeding

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further in the matter of an alleged contempt of court said to have been committed by the petitioner, and the question now is whether the writ should be made perpetual. On February 24, 1915, the following order was made and entered in the circuit court by direction of the respondent who was presiding therein:

"IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,
TERRITORY OF HAWAII.
January 1915 Term.

"IN THE MATTER OF

"CHARLES H. ROSE.

"ORDER TO SHOW CAUSE.

"WHEREAS, said Circuit Court, (the First Judge thereof presiding,) has been given to understand, by a perusal of the records of this Court, in part, and in part by the statements of witnesses, made in open Court, that on the 19th day of February, 1915, at 4:40 o'clock in the afternoon, there was issued, out of said Circuit Court and under the Seal thereof, and under the hand of one of its Clerks, a certain Bench Warrant or Warrant of Arrest for the arrest of John T. Scully and Henry B. Lewis; and that said Bench Warrant, addressed to the High Sheriff of the Territory of Hawaii, or his Deputy, the Sheriff of the City and County of Honolulu, or his Deputy, was forthwith thereafter delivered to said Sheriff for service and execution; and that said Henry B. Lewis, so named in said Warrant, was not arrested until the 22nd day of February instant, although he, the said Henry B. Lewis, was, during all of the intermediate period, present and available for the purposes of arrest within said City and County; and that the return of said Sheriff to said Warrant of Arrest inaccurately and erroneously or falsely indicates and avers that said Henry B. Lewis, together with said John T. Scully, was arrested by said Sheriff, in obedience to said Bench Warrant, on the 21st day of February, 1915;

"AND WHEREAS, upon said facts being brought to the attention of the Court, the Court directed and procured that said Sheriff, Charles H. Rose, should be immediately communicated with and requested to appear in and before this Court at 1:30

P. M. of this present date, being Wednesday, the 24th day of February, 1915, for the purpose of explaining why the mandate of said Warrant of Arrest had not been earlier complied with by him;

"AND WHEREAS, said Sheriff, Charles H. Rose, has ignored said request so made of him to so be and appear in Court and explain as aforesaid;

"NOW THEREFORE, IT IS ORDERED that said Charles H. Rose, Sheriff of the City and County of Honolulu, as aforesaid, be and he is hereby cited and ordered to appear in and before this Court, and before the First Judge thereof, in the Courtroom of said Judge, at 9 o'clock in the forenoon of Thursday, the 25th day of February, 1915, and then and there to show cause, if any he has, why he should not be adjudged guilty of contempt of court, because of the matters and things hereinabove recited, and why, if so adjudged guilty of contempt of court, he should not be punished as provided by law.

"IT IS FURTHER ORDERED that service of this Order and citation upon said Charles H. Rose, shall be made by the High Sheriff of the Territory of Hawaii, or his Deputy.

"SO ORDERED AND DONE IN OPEN COURT THIS 24th day of February, 1915.

"BY ORDER OF THE COURT

(SEAL)

"J. C. CULLEN,

"Clerk of the Circuit Court for the First
Circuit of the Territory of Hawaii."

The contention of the petitioner, who is the sheriff of the city and county of Honolulu, is that that was a void order made without jurisdiction because it was not founded on any formal affidavit or information filed in court setting forth the facts relied upon as constituting contempt of the circuit court on the part of the petitioner. It will be observed that there were three matters set forth in the order to which the sheriff was required to respond, (1) the failure to execute the warrant until the 21st or 22d day of February; (2) the making of a false return; and (3) the failure of the sheriff to appear before the court, as requested, at 1:30 P. M. on the 24th of February. Counsel for the respondent in the present proceeding state that they do

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not rely upon grounds (2) or (3) although it appears from an averment in the petition that the warrant was, in fact, not served upon Lewis until the morning of February 24th. They rely solely upon the ground of the failure and neglect of the sheriff to forthwith arrest Lewis upon the delivery to him for service of the warrant and in obedience to its command, and it is their contention that there were sufficient facts before the court to authorize the making of the order in question without the filing of any formal affidavit, complaint or information charging contempt of court on the part of the sheriff.

Under the statutes of this Territory it is a misdemeanor for an officer to wilfully and corruptly refuse, neglect or delay the serving of lawful process for the apprehension of any person charged with an offense whereby such person shall avoid arrest and go at large (R. L. Sec. 3067) and the wilful disobedience or neglect of any lawful process or order is contempt of court (R. L. Sec. 3069). The wilful refusal or neglect of a sheriff in whose hands a warrant of arrest has been lawfully placed for service to execute the same in accordance with the direction therein contained would doubtless amount to both a misdemeanor and a contempt of the court by which the warrant was issued.

The alleged contempt in this case was not committed in the presence of the court. It was a constructive contempt, though criminal in its nature. The authorities lay it down as a general rule that in cases of constructive contempt it is necessary to give the court jurisdiction to proceed against the contemnor that a formal statement, affidavit, complaint or information stating the facts be filed as a basis upon which an order to show cause or attachment may issue. 4 Enc. Pl. & Pr. 779; 9 Cyc. 38, and cases cited. This is to make the facts alleged to constitute the contempt a matter of record for the information of the court and to apprise the party proceeded against of what he is accused. To this end the courts are entitled to the assistance of the duly constituted prosecuting officers to whose

attention the courts may very properly bring any circumstances which have arisen tending to show that a contempt may have been committed. In *Hurley v. Commonwealth*, 188 Mass. 443, 446, the court said, "A prosecution for contempt of court is *sui generis*. It calls for the exercise by the court of its summary power to punish for conduct tending to obstruct or degrade the administration of justice. This power is inherent in the superior courts, because it is essential to the execution of their orders and the maintenance of their authority, and it has been recognized and used from the earliest times. If a contempt is committed in the presence of the judge, no complaint or process is necessary to give the court jurisdiction of the offender, but the court may act upon its judicial knowledge, and the contemnor may be taken into custody at once. If the contempt, instead of being direct, is indirect and constructive, knowledge of it should first be brought to the court in a way to justify formal action. This is usually by an affidavit setting forth the facts of which complaint is made. While most of the technical requirements of criminal statutes have no application, the hearing should be had with due regard for the rights of the accused, and in view of the fact that, if found guilty, he may be subjected to criminal punishment. The proper procedure is, therefore, closely analogous to that in ordinary criminal cases. In the present case the proceedings were begun by a formal complaint to the court, made by the first assistant district attorney of Suffolk County in his official capacity. He is one of the prosecuting officers of the court, duly sworn to the proper performance of his official duties. While the making of a complaint of this kind is not required of him by any statute, it is in the general line of the duties which he is regularly performing. A complaint of this kind, signed by him as a public officer, may fairly be said to carry with it the sanction of his oath of office. In the absence of a statute or of an established rule of law requiring that in all cases the complaint itself shall be sworn to, we think the matter was brought to the attention

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of the court with such support and assurance of its verity as justified the issuance of process and the subsequent hearing." It is clear that in a case even of constructive contempt all the essential facts may be before the court without an affidavit or complaint. For example, an attachment or citation may at once issue for a juror or a witness who is shown by the files of the court to have been duly summoned to attend and whose absence is evident to the court. In *State v. Frew*, 24 W. Va. 416, 471, Judge Snyder said, "In direct contempts it is almost uniformly the practice for the judge to act on his own information. He acts upon the evidence of his own senses. And in the case of constructive contempts, if he has the same kind of evidence, he is equally at liberty to act upon it. In some cases the character of the offense may be more complicated and less susceptible of furnishing such proofs of its existence as will authorize the court to act upon it. In such cases a sworn statement is necessary and should always be required as the foundation of the rule." That statement commends itself to our judgment though there may be some doubt as to its proper application in the case in which the language was used. There the contempt consisted in the publication of a defamatory article in a newspaper, and other courts have held that such cases fall within the general rule requiring the filing of an affidavit or complaint. In the case at bar the circuit court knew from the record in the case when the warrant in question was issued, but not that it immediately reached the hands of the sheriff; it knew the date when, according to the return of the sheriff, Lewis was arrested, but not that he was present in Honolulu and available for arrest prior to that date. In our opinion the case falls within the general rule relating to the procedure in cases of constructive contempt, and that the order to show cause was void because not founded on an affidavit, complaint or information setting forth facts which, unexplained, would show a wilful disobedience or neglect on the part of the accused.

It is settled in this Territory that a writ of prohibition

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may be had to restrain the enforcement through contempt proceedings of an order made by a circuit court or judge without jurisdiction though the point of lack of jurisdiction has not been raised in the court below. *Dole v. Gear*, 14 Haw. 554. In this respect there is no difference in principle between a coercive proceeding to compel the performance of an act and a punitive proceeding to punish disobedience of a lawful writ or mandate.

We hold that the writ was properly issued in this case and that it should be made perpetual as to proceedings upon the order in question.

Lorrin Andrews and *C. H. McBride* for petitioner.

J. W. Cathcart and *R. W. Breckons* for respondent.

HONOLULU ATHLETIC PARK, LIMITED, A CORPORATION, *v.* H. G. LOWRY, BILLY ORR, CHARLEY REISBERG, JUSTIN FITZGERALD, ROY McARDLE, JOHNNY KANE, "TOOTS" BLISS, CLAUDE WILLIAMS, LOU KENNEDY, JIM SCOTT, ED. KLEPFER, FRED. DERRICK, DON RADER AND JACK BLISS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED FEBRUARY 25, 1915.

DECIDED MARCH 6, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EQUITY—*pleading—amendment of bill.*

Where after a demurrer to a bill in equity has been sustained leave is asked to file an amended bill it is within the discretion of the judge to allow it if the proposed bill is not "a new bill."

SAME—*injunction bill—useless and ineffectual amendments.*

Leave to file an amended bill for an injunction should be refused where the time for which the injunctive relief is sought

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has passed. Useless and ineffectual amendments to pleadings are properly disallowed.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is a suit in equity commenced on November 25, 1914, in which the complainant prayed that the defendant Lowry be compelled to specifically perform a certain contract alleged to have been entered into by him and the complainant on the 26th day of May, 1914, in and by which Lowry "and his associates" agreed, *inter alia*, "to furnish the services of either the Venice baseball team or one other of the teams now playing baseball in the Pacific Coast League, or an all-star aggregation of players to be chosen from said Pacific Coast League, National League, or American League; said team to play a series of games at the grounds of the Honolulu Athletic Park, Limited, for a season beginning with Saturday, November 10, 1914, and ending December 14, 1914." It was averred in the bill that the words "play a series of games" were intended to mean and meant that games would be played on Wednesdays, Saturdays, Sundays and holidays; that the defendants other than Lowry were persons who composed a baseball team known as the "Venice Tigers," players of unique and extraordinary qualifications whose places could not be supplied, and who intended shortly to return to California; that the defendants without just cause or excuse and in violation of said contract refused to play baseball at the complainant's grounds, and threatened to play elsewhere in Honolulu, at a park not under the control of the complainant, and unless restrained by order of court, would play games of baseball there on November 26, 1914, and thereafter to and including December 14, 1914. The bill prayed for a temporary and permanent injunction against the respondents other than Lowry to restrain them from playing baseball at any other place in the Territory of Hawaii than the grounds of the complainant on any Wednesday, Saturday, Sunday or holiday from November 26 to December 14, 1914. The circuit

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judge at once issued a temporary injunction as prayed for. On the petition of the said baseball players this court, on November 28, 1914, granted a perpetual writ of prohibition against the enforcement of the injunction, holding the same to be void for the reason that no contractual relation was shown to exist between the members of the ball team and the complainant, that they had no interest in the subject matter of the suit between the complainant and Lowry, and that the circuit judge acquired no jurisdiction to enjoin them from playing games of ball elsewhere than at the grounds of the complainant merely because the complainant had made them parties to the suit. Further proceedings were had before the circuit judge. On December 2 the defendants other than Lowry filed a general and special demurrer to the bill of complaint. On December 17 the complainant filed a motion for leave to file an amended bill of complaint which motion was overruled on the day following, and on December 23 a decree was entered sustaining the aforesaid demurrer and denying leave to amend the bill of complaint as to the defendants other than Lowry. The complainant appeals from that decree. The contention is that by certain averments contained in the proposed amended bill the grounds upon which this court awarded the writ of prohibition would be overcome, and that the amended bill stated a case against all of the defendants upon which the complainant is entitled to at least some of the relief prayed for including a permanent injunction. The prayer of the proposed amended bill was the same as that of the original bill. Counsel rely on section 1738 of the Revised Laws, and particularly that part of it which provides that "whenever a plaintiff in an action shall have mistaken the *form of action* suited to his claim, the court or judge on motion *shall* permit amendments to be made on such terms as it or he shall judge reasonable." Whether or not the statute applies at all to suits in equity is perhaps an open question. Compare *Wilson v. Liliuokalani*, 13 Haw. 466, 470, and *Kaeo v. Campbell*, 20 Haw. 423, 425. However that may be,

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we are of the opinion that the clause quoted would not apply to this case because here the proposed amendment was not for the purpose of correcting a mistake in the form of action suited to the complainant's claim. The form of action was the same under both the original and amended bills. In *Wilson v. Liliuokalani* it was held, in accordance with the established rule of equity practice, that where an amendment offered after a demurrer has been sustained does not go to the extent of making a new bill it is in the discretion of the judge to allow or refuse it. Without stopping to analyze the proposed amended bill we assume for present purposes that it does state a case against the appellees, and that it does not constitute a "new bill" within the meaning of the rule referred to, and hold that such being the case it was within the discretion of the circuit judge to decline to allow it to be filed. Under the authority of *Wilson v. Liliuokalani* nothing further need be said. As counsel for the complainant have strongly criticized the grounds upon which the circuit judge based his ruling denying the motion to amend we may add that one at least of those grounds required the denial of the motion, and that was that the time for which the injunctive relief was asked had passed before the motion for leave to amend was filed. It is perfectly obvious that an injunction should not be granted in an attempt to prevent the doing of acts that have already been done. 22 Cyc. 759; *Shafer v. Fry*, 164 Ind. 315; *R. Co. v. Wildman*, 58 Mich. 286; *Davis v. Hartwig*, 195 Mo. 380; *Yount v. Setzer*, 155 N. C. 213. Equity will not attempt to do vain things and useless and ineffectual amendments to pleadings are properly disallowed.

The decree appealed from is affirmed.

R. J. O'Brien (*E. C. Peters* with him on the brief) for complainant.

Lorrin Andrews and *C. H. McBride* for defendants.

Akana v. Territory, 22 Haw. 479.

AKANA, ALIAS PONG KONG SING *v.* THE TERRITORY OF HAWAII.

ERROR TO CIRCUIT COURT, THIRD CIRCUIT.

HON. J. A. MATTHEWMAN, JUDGE.

SUBMITTED FEBRUARY 23, 1915.

DECIDED MARCH 10, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

INTOXICATING LIQUORS—keeping for sale without a license—charge of court to the jury.

Under the facts in this case, held, it was not error for the court to charge the jury, "If you believe, beyond a reasonable doubt, that the defendant had or kept posted about his place of business such a receipt or stamp, such fact is competent evidence that he kept intoxicating liquors for sale. Beyond this it is not necessary for the prosecution to show that the defendant did at any time sell intoxicating liquors."

SAME—same—same—proof of actual sales not necessary.

One may be convicted of unlawfully keeping intoxicating liquor for sale without proof that he actually sold any liquor or offered or exposed it for sale.

APPEAL AND ERROR—writ of error—abandonment of assignments.

In a case submitted on briefs assignments not argued in the briefs will be considered to have been abandoned and will not be noticed.

OPINION OF THE COURT BY WATSON, J.

On the verdict of a jury finding him guilty of keeping intoxicating liquors for sale without a license the plaintiff in error was adjudged by the circuit court of the third judicial circuit to pay a fine of five hundred dollars, to which judgment he obtained a writ of error. At the trial there was evidence tending to show that on the 24th of August, 1913, the date of the alleged offense, the plaintiff in error was conducting a general merchandise store or business at Kailua, county of Hawaii; that on said date the sheriff of the county of Hawaii, upon procuring a search warrant from the district magistrate, went to defend-

ant's store and served the search warrant on him, asking the defendant to deliver over the premises to him, the said sheriff, as he was about to search for liquor; also stating that he, the sheriff, knew the defendant to have a United States license. The defendant acknowledged having the license and said that he kept the same down below. He then took the sheriff and his deputy around the mauka side to his house and in a small outhouse about twenty feet away the sheriff found the United States license (so-called) stuck up on the wall inside of that small building, and also inside the outhouse were found intoxicating liquors consisting of sixty-four bottles of beer, twenty-one bottles of samshu, two full gallons of wine and two empty demijohns smelling of wine—one five-gallon demijohn and one one-gallon demijohn. The sheriff testified to the following effect: "So I asked the defendant by what right he was keeping that United States license and he said that he had the right to keep it and that he keeps it because that haole from Honolulu came and gave it to me so that I can keep and sell liquor." Further search was made in the bedroom of plaintiff in error upstairs over the store where there were found a bottle of samshu about three-fourths full and a half-gallon bottle of wine. Defendant acknowledged that his name or mark was on the barrels and boxes in which the liquor came and that the license was made out in his proper name. None of this evidence was contradicted or attempted to be contradicted by the defendant, even as to the declaration by himself, testified to by the sheriff and another witness, that he obtained the federal license in order that he could keep and sell liquor. The defendant was unrepresented by counsel at the trial and neither cross-examined the witnesses for the prosecution nor adduced evidence in his own behalf, although duly informed by the court that he had the right to do both.

The errors assigned are two—first, that the court erred in that part of its charge to the jury as follows:

"In this jurisdiction it is provided by law that the fact that any person engaged in any kind of business has or keeps posted

in or about his place of business a receipt or a stamp showing payment of a special tax levied under the laws of the United States upon the business of selling intoxicating liquors, shall be held and deemed competent evidence that such person is keeping for sale and is selling intoxicating liquors. Hence if you believe, beyond a reasonable doubt, that defendant had or kept posted in or about his place of business such receipt or stamp such fact is competent evidence that he kept intoxicating liquors for sale. Beyond this it is not necessary for the prosecution to show that the defendant did at any time sell intoxicating liquors,"

and second, that the court erred in overruling the motion of the defendant for a new trial.

Under the facts in this case, as shown by the uncontradicted evidence, we think that there was no error in that portion of the charge of the court hereinabove quoted, to which plaintiff in error's first assignment relates. It is provided by Act 157 of the Laws of 1913 (omitting the title of the act and the enacting clause) as follows:

"Section 1. Act 119 of the Session Laws of 1907 is hereby amended by adding thereto a new Section to be known as Section 38A, and to read as follows:

"Section 38A. In any prosecution under this Chapter, the fact that any person engaged in any kind of business has or keeps posted in or about his place of business a receipt or stamp showing payment of a special tax levied under the laws of the United States upon the business of selling intoxicating liquors or the holding of a license from the government of the United States in the name of any person to sell intoxicating liquors shall be held and deemed competent evidence that such person is keeping for sale and is selling intoxicating liquors." (Approved April 30, 1913.)

We are of the opinion that by the word "competent" as used in the act the legislature meant admissible for the purpose of establishing the fact that intoxicating liquors were kept for sale and sold, in other words, such evidence as, if believed, would authorize a jury to find the fact. *State v. Johnson*, 12 Gil. (Minn.) 378, 387. The jury were properly instructed, "If you

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believe, beyond a reasonable doubt, that the defendant had or kept posted about his place of business such a receipt or stamp, such fact is competent evidence that he kept intoxicating liquors for sale." The having or keeping posted of the receipt or stamp showing payment of a special tax levied under the laws of the United States upon the business of selling intoxicating liquors is by the statute made evidence of the design or intent to sell it. 1 Wigmore on Evidence, p. 297, n. 3. As was said in *State v. Nethken* (W. Va.), 55 S. E. 742, 743, "The presumption (arising from the possession of the receipt or stamp) is one of fact, amounting to evidence upon which a jury or court may act. Many illustrations of the application of the rule will be found in the decisions referred to in 1 Greenleaf on Evidence §14k, and 22 Am. & Eng. Ency. Law 1241. Its application here clearly establishes a prima facie case imposing upon the defendants the alternative of overthrowing it with counter evidence or submitting to it. They chose the latter and their appeal to the court on this point is necessarily fruitless." A reading of the entire charge of the court to the jury convinces us that the rights of the plaintiff in error were properly safe-guarded and we think there is no merit in the contention of counsel for plaintiff in error that that portion of the charge quoted was an invasion of the province of the jury and tantamount to an absolute direction by the court to the jury to return a verdict of "guilty."

Having before them the evidence of two witnesses, not only as to the finding of the so-called federal license, together with a quantity of intoxicating liquors, in the outhouse near the defendant's place of business, but also the uncontradicted evidence of such witnesses as to the admission made by the defendant that he kept the license so that he could keep and sell liquor, the jury were properly instructed that, if they believed the evidence, "beyond this it is not necessary for the prosecution to show that the defendant did at any time sell intoxicating liquors." "One may be convicted of unlawfully keeping liquor for sale without proof that he actually sold any liquor or offered or exposed it

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for sale." 23 Cyc. 174; *Commonwealth v. Meskill*, 165 Mass. 142.

Under the second assignment, that the court erred in overruling defendant's motion for a new trial, the contentions argued by counsel for plaintiff in error are for the most part disposed of by what we have previously said. The first two grounds of the motion and the only ones argued by counsel for plaintiff in error in their briefs are that the verdict of the jury was contrary (a) to law, and (b) to the evidence and the weight of the evidence. We have carefully read the evidence in the case and are of the opinion that there was no error committed by the lower court in overruling defendant's motion for a new trial. The evidence was amply sufficient to support the verdict, and as has already been said, we find no error in the charge of the court to the jury. This case by stipulation of counsel having been submitted in this court on briefs, assignments not argued in the briefs will be considered to have been abandoned and will not be noticed. 2 Cyc. 1014; *Republic v. Ah Yee*, 12 Haw. 169.

Finding no error in the record the judgment should be affirmed, and it is so ordered.

A. S. Humphreys and *W. J. Robinson* for plaintiff in error.
L. P. Scott, *Deputy Attorney General*, for the Territory.

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TERRITORY OF HAWAII v. JOHN T. SCULLY, WILL-
MOT R. CHILTON AND JOHN H. FISCHER.

MOTION TO DISMISS RESERVED QUESTION.

HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 8, 1915.

DECIDED MARCH 16, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*reserved question—construction of statute.*

Under Sec. 2511 R. L. 1915, while the authority to reserve is discretionary with the trial court, the statute did not intend that questions should be reserved unless the judge below has well founded doubts upon them.

SAME—*same—motion to dismiss.*

Where the identical question reserved has not been ruled upon by the trial court, and is one of great public importance which has never been ruled upon by this court, it will not be dismissed on motion although a question in all respects similar appears to have been ruled on by the trial court in the same case.

OPINION OF THE COURT BY WATSON, J.

John T. Scully, Willmot R. Chilton and John H. Fischer were jointly indicted for conspiracy in the first degree. The defendants Scully and Chilton interposed separate motions to quash the indictment, the motions being made on the same grounds and supported by affidavits identical in all respects. These motions came on to be heard on October 28, the Scully motion being taken up first, when the deputy city and county attorney, for the government, interposed an oral demurrer to said motion, whereupon the court, by consent of parties, reserved and ordered to be certified to this court the question whether said demurrer to said motion to quash should be sustained. Thereupon and immediately following the order reserving such question on the Scully motion the Chilton motion to quash said indictment was taken up by the court, to which said motion the deputy city and county attorney also interposed an oral demur-

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rer. The court sustained said demurrer and overruled said motion of said defendant Chilton to quash said indictment, to which ruling said defendant Chilton, by his attorney, noted an exception. The reserved question on the Scully motion coming before this court on the transcript of the record sent up by the circuit court in connection therewith, the city and county attorney, for the government, moves to dismiss the same on the ground that the circuit court on the same day and date upon which the question aforesaid was reserved, in passing upon the demurrer to the Chilton motion, acted upon and decided the very question reserved to this court in connection with the Scully motion, and sustained a demurrer to a motion to quash the same indictment, which motion was made and interposed by the defendant Chilton, for the same reasons and on identical and similar grounds and based on the same facts as presented by the motion to quash made and interposed by the above named defendant John T. Scully, and on which the reserved question is now presented.

The statute (Sec. 2511 R. L. 1915) provides:

"Whenever any question of law shall arise in any trial or other proceeding before a circuit court or circuit judge in chambers, the presiding judge may reserve the same for the consideration of the supreme court; and in such case shall report the cause, or so much thereof as may be necessary to a full understanding of the questions, to the supreme court."

In support of his motion to dismiss counsel for the motion relies strongly on *McCandless v. Lansing*, 19 Haw. 467, where it was held that questions already ruled on by the trial court cannot be reserved. In that case, after directing a verdict for the plaintiff, the trial court reserved for the consideration of this court the question "whether the verdict is contrary to law" upon the statement of facts submitted. Under the law then (and now) in force (Sec. 1804 R. L. 1905 as amended by Sec. 1, Act. 83, S. L. 1907; Sec. 2441 R. L. 1915) it is provided: "Judgment may be entered by the clerk immediately upon the

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rendition of a verdict, judgment or decision," etc. In declining to answer the question reserved in the *McCandless* case the court said, "No question is presented which the judge had not ruled upon. The statute does not authorize this court in answering reserved questions to order such judgment 'as is fit and proper for the further disposition of the case' (Mass. Pub. St. p. 832), nor, as in cases of exceptions, to vacate a judgment and require such further proceedings 'as to law and justice shall appertain.' Sec. 1867 R. L. The circuit judge is advised that no question is presented which the court can consider." We think the case at bar is clearly distinguishable, on the facts, from the *McCandless* case, and that the ruling in that case is not here in point. The identical question reserved in this case has not been ruled on by the trial court (although a question in all respects similar appears to have been), nor has any verdict or judgment been entered in this case.

We think the statute authorizing the reserving of questions to this court never intended that questions should be reserved unless the judge below has well founded doubts upon them, and while the action of the trial court in reserving this question and immediately thereafter ruling upon a similar question would, on its face, indicate that whatever doubts the court may have entertained at the time of the reservation were thereafter quickly removed, and the reservation would seem to be almost a trifling with this court; nevertheless we do not feel that we would be justified in holding on the record before us that the question was, in the first instance, improperly reserved, and that it should be dismissed. The question presented has never been ruled on by this court and it is undoubtedly of great public importance. The statute is broad, and authority to reserve is discretionary with the trial court. *The Queen v. Poor*, 9 Haw. 218, 220.

While not necessarily involved upon this pending motion we deem it not improper to refer to the fact that in the record now before us the grounds of the oral demurrers interposed to the

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several motions to quash nowhere appear. In the present state of the record it is impossible to ascertain whether the grounds of the demurrer interposed to the Scully motion were the same as the grounds of the demurrer interposed to the Chilton motion. For this reason alone, if for no other, we would be unable to grant the motion to dismiss, the motion being based on the record, pleadings and files and the facts relied on not appearing therefrom. However, we prefer to rest our decision on the ground already stated.

In anticipation of this matter again coming before this court on the merits we also call attention of counsel to certain authorities holding that the disposition of a motion to quash, being largely discretionary, is not a proper subject for a reserved question. *U. S. v. Rosenburgh*, 7 Wall, 580; *U. S. v. Canda*, 154 U. S. 674; *U. S. v. Avery*, 13 Wall. 251; *U. S. v. Hamilton*, 109 U. S. 63.

The motion to dismiss is denied.

J. W. Cathcart, City and County Attorney, for the Territory.

Lorrin Andrews for defendant John T. Scully.

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GEORGE E. WARD *v.* INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, A HAWAIIAN CORPORATION.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. W. J. ROBINSON, JUDGE.

ARGUED FEBRUARY 15, 1915.

DECIDED MARCH 24, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

MASTER AND SERVANT—*negligence—defective appliance.*

If the master negligently furnishes unsuitable appliances for conducting his business by reason of which his servant is injured, he is responsible in damages to the servant for such injuries, although the latter may have been negligent, unless the negligence of the latter was the proximate cause, or a proximate cause, of the injury.

SAME—*proximate cause question for jury.*

Whether an act of negligence is the proximate cause of an injury is a question for the jury to decide where the evidence is conflicting; or where the answer depends upon matters of discretion, experience and judgment; and in all cases where more than one inference may be reasonably drawn from the facts which the evidence tends to prove.

SAME—*intervening cause.*

The master is not exempt from liability for an injury to his servant, caused by a defective appliance, by reason of an intervening act or cause, where the latter grew out of, was related to, and made necessary by, the negligence of the master in furnishing such defective appliance.

INSTRUCTIONS—*interest of witness.*

An instruction which told the jury to take into consideration the interest of the plaintiff in the result of the suit when weighing his testimony was properly refused, especially as the court had instructed the jury that in weighing the evidence of witnesses they should take into consideration the interest, if any, of the witness, in the result of the suit.

VERDICT—*excessive damages.*

A verdict for \$13,000 damages held to be not excessive where the evidence shows that the plaintiff was a strong, healthy, robust man at the time of the accident, forty years of age, earning six

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dollars per day, and by reason of the injury complained of suffered a fracture of the skull, concussion of the brain, a central dislocation of the hip, a distortion of the spine, impairment of vision and hearing, considerably diminished earning capacity, and had continually suffered great physical pain; the assessment of damages being left, by law, to the discretion of the jury, whose verdict will not be disturbed unless so excessive and outrageous, under the evidence, as to demonstrate that they permitted their passions and prejudices to mislead them into giving a verdict against the rules of law.

OPINION OF THE COURT BY QUARLES, J.

At the conclusion of the evidence on behalf of the plaintiff (now defendant in error), at the first trial, the circuit court entered judgment of nonsuit, in favor of the defendant (now plaintiff in error), to review which, the plaintiff sued out a writ of error in this court, and the judgment of nonsuit was reversed. We will here refer to the former decision of this court (ante page 66) as showing the material facts. An examination of the record now before us shows that the evidence is substantially the same so far as the plaintiff's case is concerned, as at the former hearing. Upon the return of the case a new trial was had and a verdict for \$13,000 damages rendered in behalf of the plaintiff; and, to review the judgment entered thereon, defendant has sued out a writ of error in this court. In the former decision this court held that the contention of the plaintiff that the negligence of the defendant in furnishing a cable which was burred and unsafe was the proximate cause of the injuries, which he sustained, should have been submitted to the jury, on the evidence, under proper instructions. The defendant has assigned a number of errors of law occurring during the progress of the cause, some of which have not been argued, some abandoned, and some of them relied upon for a reversal of the judgment now to be reviewed. The principal contention of the defendant now, is, that the court erred in refusing to give its request for an instructed verdict, basing this contention upon the ground that, under the evidence, the ques-

tion as to the proximate cause of the injury was one of law to be decided by the court, and not a question for the jury. It will thus be seen that the principal question before us is the same, in a different form, as that before us at the former hearing.

After full consideration we are of the opinion that the former decision in this case is correct, under the evidence disclosed in the record, and under the authorities. We therefore adhere to the former decision, and hold that the question of proximate cause was properly submitted to the jury. It is contended, with much earnestness, on behalf of the defendant, that the defective cable described in the former decision, was not of itself, dangerous; that after it came off the pulleys, and the engine was stopped, it was inert, and incapable of injuring the plaintiff; that it did not injure the plaintiff, and was not the proximate cause of the injury, and, at best, it only furnished the *occasion* for the plaintiff going to replace the cable on the pulleys. If the cable came off the pulleys by reason of its worn condition, as some of the evidence tends to show, and in doing so had struck the plaintiff and injured him, it would follow that the use of the cable in such condition was negligence, and the proximate cause of such injury. But, it is the duty of the master to furnish suitable and safe appliances for his servants to conduct his business with, and this duty is not fulfilled by simply furnishing appliances that may be used, but which, owing to their defective condition, are liable to be misplaced and thereby necessarily subjecting the servant to extraordinary risks by replacing them. In other words, the assumption of the ordinary risks of an employment by the servant does not extend to those risks arising from defective machinery or appliances, where, as in the case at bar, the defects are known to the master, and, at the complaint of the servant, he has promised the servant to replace the defective appliance with one that is suitable. The jury were justified in finding from the evidence three facts which are material to the issues in the case, viz., (1) that owing to the burred condition of the cable, strands of wire protruding

from it from one-sixteenth to one-quarter of an inch, it had a tendency to climb up on, and run off, the pulleys; and, therefore, was not suitable for the purpose for which it was necessarily used; (2) that the defendant promised the plaintiff to replace the cable with a new one, and failed to do so; and (3) that defendant's neglect to replace the defective cable with a new one, made it necessary for the plaintiff to leave his usual work and go upon the elevated track of the defendant (a height of about 25 feet) thereby incurring an extraordinary hazard which would not have existed if a suitable cable had been installed. The jury were also justified in finding that a man of ordinary care and prudence, under the circumstances, would naturally apprehend that the cable would come off the pulleys; and the foreman, Akina, being absent, under such circumstances plaintiff would go and attempt to replace it; that being on an elevated trestle, 25 feet above ground, injury to plaintiff would probably result.

We will notice the principal authorities cited by the defendant to sustain the contention that the defective cable was not the proximate cause of the injury sustained by the plaintiff, and that that question should have been decided by the court by instructing the jury to find for the defendant. In the case of *Carter v. Lockey Piano Case Co.*, 177 Mass. 91, the court directed a verdict for the defendant upon the ground that the injury was caused by the negligence of a fellow servant of plaintiff while operating an elevator in failing to use a stopping cable or clamp, there being no negligence of the defendant in failing to supply suitable and safe appliances. In the case of *Mo. Pac. Ry. Co. v. Columbia*, 65 Kan. 390, the deceased had worked for the defendant seven years, the last five as fireman on one of its engines; during all that time the defendant had kept piled on its platform at Langley, where the accident occurred, a pile of grain doors, from eleven to fifteen in number, conspicuously placed from fifteen to twenty-two feet from the track, by which the deceased had passed about six hundred

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times; along its line the defendant, where there were grain elevators, kept piles of grain doors stored near such elevators, and at stations where there were no elevators (such as Langley) kept such doors piled at the station; the accident whereby deceased lost his life was caused by the grain doors being blown off the platform on to the track, by a violent storm, amounting to a gale; no similar accident had ever occurred before on defendant's road; that the accident would not have occurred but for such storm. These facts were found in a special verdict by the jury, being submitted to them. The jury also found that the wind storm was not the proximate cause of the accident, but the negligence of the defendant in piling the grain doors on an exposed platform was the proximate cause, and found a general verdict for the plaintiff. There was no evidence to show how long the doors had been on the track prior to the accident, or that any officer or agent of the defendant knew that the doors were on the track. On appeal the special verdict was treated as finding the material facts in favor of the defendant, and the court held that the conclusion of the jury as to the proximate cause of the accident was inconsistent with the facts found, holding the accident to have been caused by the act of God, one which no reasonably prudent man would have anticipated, set aside the verdict and directed the trial court to enter, in accord with the special verdict of the jury, a judgment in favor of the defendant. In *Leavitt v. Ry. Co.*, 89 Me. 509, the injury resulted from the independent act of a contractor, not of the defendant, and the controlling principle of the decision is that an employer is not responsible for the negligent acts of a contractor, or his servants, when they act independently and are not under the control and direction of the employer. In the case of *Empire State Cattle Co. v. Atchison, etc., Ry. Co.*, 135 Fed. 135, 140, plaintiff sought to recover damages for loss of cattle in an unprecedented flood, on the ground that it had been negligent in delaying the shipment, and claiming that if there had been no delay in making the shipment, the cattle might not have

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been lost. There, the court properly held that the defendant was not liable for an injury caused by the act of God which it could not reasonably have apprehended. We do not regard those cases as in point here.

We will cite a few authorities in addition to those cited in the former opinion in this case, which recognize, and, as we think, sustain the principles applicable hereto. In *Peoria, etc., Ry. Co. v. Puckett*, 42 Ill. App. 642, a brakeman was required to disconnect cars while they were in motion, and although held to have assumed the extra hazard of doing so, the court said, at page 649: "If a brakeman be required to thus do such work, and while attempting to perform it with care and prudence commensurate with the increased danger of such duty he is injured, not by some peril attendant upon the manner of doing the work, but by a danger arising from a failure of the railroad company to use reasonable care to discharge a duty incumbent by law upon it, no reason is perceived why a recovery may not be had for such injury." "It is the risk of ordinary perils incident to the service that the employee assumes, not the hazards of extraordinary risks added by the failure of the employer to perform the duty enjoined upon him by law." (*Rogers v. Leyden*, 127 Ind. 50.) In *Knapp v. Ry. Co.*, 65 Iowa 91, 95, the defendant had permitted its road-bed to get into bad condition, being lower at one place than it should be, whereby a train was derailed, and its servant, an engineer, was injured. It was claimed by the defendant that the negligent manner in which the engineer used the lever was the proximate cause of the injury. The court said: "True it is that reversing the lever is one of the ordinary hazards of the plaintiff's employment; yet, if the negligence of the defendant required such act to be done at that particular time, and the plaintiff was not guilty of negligence, but, on the contrary, acted prudently, with due regard for his own safety and the safety of others, then the defendant is liable, because the negligence of the defendant is the proximate cause of the injury." And in the same case, re-

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ported in 71 Iowa 41, the court said: "It is next insisted that the verdict is unsupported by the evidence. This claim is based upon the position that the injury to plaintiff resulted from his arm or hand being caught in the latch of the lever, when he reversed it quickly in order to stop the train after it had left the track, and not from his arm or elbow coming in contact with the side or end of the cab, when making the movement as claimed by plaintiff in his testimony. We need not enquire which of these theories is correct. There was evidence to support plaintiff's theory, and the jury may well have found it to be correct. But if it be assumed that defendant's theory as to the cause of the injury be correct, the direct cause was defendant's negligence in failing to keep the track in proper condition, which caused the engine to leave the rails, and required plaintiff to reverse the lever in order to arrest the movement of the engine. If this was done in the exercise of due care, and injury resulted, the proximate cause was defendant's negligence which demanded the reversal of the lever in the manner in which it was done by plaintiff."

The plaintiff was justified in relying upon the promise of the defendant to replace the defective cable with a new one, and should not be held to have anticipated that defendant would not replace such cable. Neither should he be held to have anticipated that the foreman, Akina, would be absent; or, that he would have to leave the hold of the ship where he was working and go to replace the cable. In the case of *Helpenstein v. Medart*, 136 Mo. 595, the court, at page 614, said: "It is true that he assumed all risks that were reasonably incidental to the character of his work, but he did not assume risks which might occur by reason of the negligence of his employer, and which he could not have been expected to anticipate." In *Dickson v. Omaha, etc., Ry. Co.*, 124 Mo. 140, the plaintiff's intestate, an engineer, was running his train at a rate of speed that violated a rule of the defendant, and while doing so the engine collided with a bull, the engine was derailed, and the engineer was

killed; the bull had strayed upon the track through a defective fence; a statute required the defendant to fence its track. The court held that the failure of the defendant to keep the fence in repair was the proximate cause of the injury, and not the rate of speed at which the plaintiff's intestate was running his train. This authority recognizes another rule which is well established to the effect that although the servant may have been negligent and thereby contributed to his injury; or, the injury may have been caused in part by the negligence of a fellow servant, yet, if the master has been negligent in keeping his premises, or appliances which he furnishes the servant to carry on his business, in a suitable and safe condition, he is responsible in damages for injuries received by the servant resulting from his negligence, notwithstanding the negligence of the servant, or fellow servant, unless the negligence of the servant, or fellow servant, was the proximate, or a proximate cause of the injury. To the same effect, and sustaining the same principle, see the following authorities: *Eureka, etc., Co. v. Wells*, 29 Ind. App. 1, 6; *Hogue v. Sligo Furnace Co.*, 62 Mo. App. 491; *Cole v. Warren Manfg. Co.*, 63 N. J. L. 626; *Paulmier, etc., v. Erie R. R. Co.*, 34 N. J. L. 151; *Benson v. Lumber Co.* (Wash.) 129 Pac. 403; *Missouri, etc., Ry. Co. v. Jones* (Tex. Civ. App.) 80 S. W. 852; *Smithwick v. Hall, etc.*, 59 Conn. 261; *Coogan v. Aeolian Co.*, 87 Conn. 149; *Central Ry. Co. v. Mitchell*, 63 Ga. 173; *Reed v. Railway Co.*, 72 Iowa 166; *Fickett v. Lisbon Falls Fibre Co.*, 91 Me. 268; *Ford v. Fitchburg Ry. Co.*, 110 Mass. 240; *McDonald v. Mich. Cent. R. Co.*, 108 Mich. 7; *Flynn v. Kansas City, etc., Ry. Co.*, 78 Mo. 195; *Stone v. Boscawen Mills*, 71 N. H. 288; *Lindsay v. Norfolk & So. R. Co.*, 132 N. C. 59; *Orr v. Southern Bell Tel. & Tel'g. Co.*, 132 N. C. 691. In *Smithwick v. Hall*, supra, the plaintiff, while helping to store ice for the defendant, stood at a point on a raised platform where it was narrow and not protected by a guard rail, and slippery with fragments of ice, contrary to a warning by the foreman that the particular place was dangerous; and while at

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such place was injured by a brick wall, negligently constructed by the defendant, falling on him. The court held that he was entitled to substantial damages, saying, at page 269: "Nor was his conduct, legally considered, a cause of the injury. It was a condition rather. If he had not changed his position (from a former one) he might not have been hurt. And so too if he had never been born, or had remained at home on the day of the injury, it would not have happened; yet no one would claim that his birth or his not remaining at home that day can in any just or legal sense be deemed a cause of the injury." "In cases where the defendant fails to perform its duty in furnishing safe and suitable appliances, the plaintiff will not be held to have assumed the risk in undertaking to perform a dangerous work, unless the act itself is obviously so dangerous that in its careful performance the inherent probabilities of injury are greater than those of safety." *Orr v. South. Bell Tel. & Tel'g. Co.*, supra, page 694, and authorities there cited. The master assumes the duty of exercising reasonable care and prudence to provide the servant with reasonably safe machinery, appliances and tools to exercise the employment, and to maintain them in a reasonably safe condition. (*Davis v. Railroad Co.*, 55 Vt. 84; *Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451.)

Additional authorities other than those cited in the former opinion in this case (ante page 72) upon the proposition that the question of the proximate cause of the injury to plaintiff was a question for the jury are abundant. In *Vinton v. Schwab*, 32 Vt. 612, the court said at page 614: "But where there is no conflict in the testimony in regard to the particular facts, that will not always make it a mere question of law which the court may determine. If it still rests upon discretion, experience and judgment, it is a matter of fact and not of law merely. A man in any situation or business is always bound to conform to the rules and usages which prudent and careful men have established in the conduct of similar business under similar circumstances. And it is negligence to make any im-

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portant departure from such a course, when it proves more injurious to others than the usual course." And again, it has been said: "What is negligence is a question of law when the facts are undisputed. But where the facts are controverted, or more than one inference can be drawn from them, it is the province of the jury to pass upon an issue involving it. *Deans v. Railroad*, 107 N. C. 686. A mixed question is then presented, and it becomes the duty of the judge, at the request of counsel, to tell the jury how to apply the law of negligence to the various phases of the testimony, and the office of the jury to make the application of the law, as given by the court, to the facts as found by them." (*Tillett v. Railroad*, 118 N. C. 1031.) If negligence may be inferred from a proven circumstance, the inference should be made by the jury, and not the court. (*Cole v. Warren Manfg. Co.*, supra.) Any conflict in the evidence touching the safety and suitability of the appliance furnished by the master to the servant with which to conduct the business of the master, makes the question one for the jury whose verdict will not be disturbed. (*Swift & Co. v. Holoubek*, 60 Neb. 784.) But ordinarily the question of negligence is one of intermingled law and fact, and is for the determination of the jury. The law does not—as it cannot—prescribe a general measure of carefulness, except that which varies with the circumstances of each particular case, viz., what would prudent persons ordinarily do under like circumstances. (*Kelly v. St. Paul, etc., Ry. Co.*, 29 Minn. 1.) "Where there are doubtful and qualifying circumstances, the question of negligence or want of proper care is a matter of ordinary observation and experience of the conduct of men, and as such, must be left to the jury, as being within their legal province. The law has said, in these cases, that the plaintiff shall have the judgment of twelve men, and not the opinion of one man." (*Bonnell v. Del. Lack. & West. R. R. Co.*, 39 N. J. L. 189, 192.) And to the same effect are the following decisions: *Railroad Co. v. Stout*, 17 Wall. 657; *Gaynor v. Old Colony R. W. Co.*, 100

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Mass. 208; *Salter v. Utica R. R. Co.*, 88 N. Y. 43; *French v. Taunton Branch R. R. Co.*, 116 Mass. 537; and the *Baltimore, etc., R. Co. v. Walborn*, 127 Ind. 142, where it is said: "Where the facts are undisputed, and where but one inference can be drawn from the undisputed facts, the question of negligence is one of law; but where more than one inference may be reasonably drawn from the facts, the question is one of fact for the jury, under proper instructions from the court." See *Gardner v. Michigan Cent. Ry. Co.*, 150 U. S. 349 and authorities therein cited on page 361. Many other citations along the same lines can be made, but we deem it unnecessary to make them.

It is contended on behalf of the defendant that the plaintiff was guilty of contributory negligence in that he failed to raise the weight taking up the slack of the cable, so as to make it safer and easier to replace the cable upon the pulleys. Upon this phase of the case there were conflicting evidence and theories, that of the plaintiff being that it was not necessary as there were two or three inches of slack at the place where the cable had slipped off the pulleys, all that was necessary; and that lifting the weight would not give any more slack at the place where the cable was to be replaced on the pulleys unless the cable was drawn by hand from the point where the weight was installed, to the point where the cable was to be replaced on the pulleys. The theory of the defendant being that lifting the weight would have given sufficient slack at the point where the pulleys were to be replaced to make it safe to replace them, and that if the weight had been lifted the injury would have been avoided. This feature of the case covering the question whether or not the plaintiff was guilty of contributory negligence which caused his injury was submitted fairly to the jury, by the court, under proper instructions, and the finding of the jury was against the contention of the defendant, and the verdict, so far as the question of contributory negligence on the part of the plaintiff is concerned, should not be disturbed. On this point the jury were instructed as follows: "In determining the issue of plaintiff's

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contributory negligence, you may look to all the surrounding facts and circumstances in evidence before you, and determine therefrom whether or not the plaintiff used such care as a person of ordinary prudence would have used under the same or similar circumstances. If you believe from the evidence that he was using ordinary care and prudence during the attempt to replace the cable at the time of the accident, then, I instruct you that the plaintiff was not guilty of contributory negligence. The law does not oblige a servant to pursue a method which is absolutely safe. All that is required of him is that he shall exercise ordinary care and prudence so that he will save himself from injury, and although you may find that the lifting of the weight, or box, might have been the safest course for the plaintiff to pursue, yet, if you find from the evidence that the plaintiff at the time of the accident was exercising ordinary care during his attempt to replace the cable, then he cannot be said to be guilty of contributory negligence that would bar recovery. In other words, the negligence of the plaintiff, in order to bar recovery, must be such as to directly contribute to his injuries, and without which the accident would not have happened; and it is for you to determine from the evidence whether or not the plaintiff was exercising ordinary care and prudence under all the surrounding circumstances." This particular instruction was accepted to by the defendant, and the giving of it is one of the errors assigned here, but we think there was no error in giving it. At the request of the defendant the court gave the following instruction, more favorable to the defendant, we think, than it was entitled to, to wit: "To warrant a recovery in this case it must appear that the injury was due solely to the want of ordinary care on the part of the employer—the defendant, and unless you so find your verdict should be for the defendant. If you find that the injury was due to the want of such care on the part of the employer combined with want of ordinary care on the part of the plaintiff then both are at fault and one cannot recover from the other. Where both parties are negligent there can be

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no recovery by either." As we have heretofore shown, the plaintiff is not precluded from recovering on the ground that he has been negligent, unless his negligence was the proximate cause, or a proximate cause, of his injury. Later, at the request of the defendant, the court gave, after making an immaterial modification, the following instruction: "The law places upon all persons the duty of exercising reasonable care to avoid injury, and even though the jury should believe, from the evidence, that the defendant was negligent and that the plaintiff was injured thereby, if the evidence also shows that the injury would have been avoided by the exercise of ordinary care by the plaintiff, and that the plaintiff did not exercise such care, you should find for the defendant."

It is also contended with much earnestness on behalf of the defendant that the injury to the plaintiff was the result of an efficient intervening cause between the alleged negligence of the defendant in failing to replace the defective cable with a suitable one, and such injury, viz., the act of the plaintiff in attempting to replace the cable on the pulleys, for which reason the defendant is not liable. Under the instructions quoted, and a number of other instructions given by the court, the jury were fully instructed as to the duties of the defendant, as master, and of the plaintiff, as servant. The jury were also fully instructed as to such contributory negligence on the part of the plaintiff as would prevent him from recovering, and the charge of the court, as a whole, was as favorable to the defendant as the law will justify, if not more so. Under the evidence and the instructions the jury were authorized to find the following facts: That the worn and burred condition of the cable caused it to come off the pulleys; that it had a short time before, on two different occasions, come off the pulleys from the same cause; that the defendant's attention was called to the defective condition of the cable, and it promised the plaintiff to replace the cable with a new one; that if it had done so the injury to plaintiff would not have occurred; that a reasonable and prudent man

under the circumstances would have anticipated that the cable would come off the pulleys, and under the circumstances, the plaintiff would attempt to replace it, and that the injury to plaintiff was probable, or liable to happen, owing to the height of the conveyor above ground; that defendant's failure to replace the defective cable with a suitable one was an act of negligence, and the proximate cause of the injury; that the hazard of replacing the cable was an extraordinary one made necessary by the defendant's negligence, and the attempt to replace the cable made by plaintiff was not a predominating cause of the injury, but related and connected to defendant's act of negligence, and made necessary thereby; that the plaintiff was not negligent, and acted as an ordinarily careful and prudent man would have acted under the circumstances.

Defendant (plaintiff in error) contends that the defective cable only gave occasion to the act of plaintiff in attempting to replace it on the pulleys. This is true, in that it became necessary to replace the cable. Now this occasion was an incident to the condition of the cable and grew out of it. The attempt to replace the cable was another incident, and if considered as an intervening act or cause, it is obvious that it grew out of, was related to, and made necessary by, the defective condition of the cable; and was not a separate, distinct, unrelated or disconnected intervening cause, such as will relieve the master from liability. Many authorities might be cited upon this point, but we will cite only a few of them. "Here, as in other cases, where an injury is the result of several causes combining or concurring to produce it, the master will be liable if he is responsible for any one of such causes. Here, as in other relations, the direct or proximate consequences of a wrongful act are those which occur without any intervening cause; and, where an efficient adequate cause has been found, it must be considered as the true cause unless another, not incident to it, but independent of it, is shown to have intervened. The test is, to consider where the injury would have happened to the servant but for the negli-

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gence of the master with regard to the concurrent act or omission of the third person. Thus, where a servant was injured because of a defective appliance which the master should have repaired, the latter was not relieved from liability because a proximate cause of the accident was the act of a third person, if it would not have occurred but for the failure to repair." (Com. on the Law of Neg., Thompson, Vol. IV, Sec. 3857.) "Negligence and wrongful conduct having been established, the general rule is, that the defendant is liable for the natural and proximate damages resulting therefrom—such consequences as might probably ensue in the natural and ordinary course of events. Though the defendant is not responsible for any events produced by independent intervening circumstances, which have no connection with the primary act; if the intervening agencies are put in operation by the wrongful act of the defendant, the injuries directly produced by such agencies are proximate consequences of the primary cause, though they may not have been contemplated or foreseen. The relation of cause and effect between the tortious act and the intervening agencies being shown, the same relation between the primary wrong and the subsequent injuries is also established; the first wrongful act operating through a succession of circumstances, each connected with, and originated by the next preceding." (*East Tenn., Va. & Ga. R. R. Co. v. Lockhart*, 79 Ala. 315.) These authorities are in point here, and with other authorities herein cited, and those cited in the former opinion in this case (ante page 73), establish the liability of the defendant for the injury sustained by plaintiff, and the verdict is sustained under the evidence, and under the instructions given by the trial court.

One of the assignments of error is to the refusal of the trial court to give defendant's request for instruction No. 19, which was in the following words: "The jury is instructed that while a plaintiff is, by law, allowed to testify in his own behalf, yet the jury have the right, in weighing his testimony and determining how much credence is to be given it, to take into considera-

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tion the fact that he is the plaintiff and directly interested in the result of the suit." This instruction was properly refused. It referred to and made prominent one feature of the evidence, that is, the interest of the plaintiff in the result of the suit. The court had theretofore given a very proper instruction which applied to plaintiff, as a witness, the same as other witnesses, to the effect, that, in weighing the evidence of witnesses, they should take into consideration "their interest or lack of interest, if any, in the result of the suit."

One of the errors assigned by defendant is that the verdict for \$13,000 is excessive and unreasonable. This was also one of the grounds of the motion for a new trial, which the trial court overruled. The evidence shows that prior to the injury plaintiff was a healthy, strong, robust man, with unimpaired vision and hearing, of the age of forty years, and earning six dollars per day; that his expectancy of life was 27.61 years; that he suffered a basic fracture of the skull, concussion of the brain, a central dislocation of the hip, a distortion of the spine, an impairment of vision and hearing, and that his earning capacity was considerably diminished; and, from the time of the injury to the trial he suffered, continually, great physical pain. As to the measure of damages, among other instructions, the court gave the following: "If the jury finds from the evidence that the plaintiff is entitled to recover, as alleged in his complaint, in estimating the plaintiff's damages you may take into consideration his physical condition prior to the injury, and also his physical condition since the injury, if you believe from the evidence that his physical condition since the accident has been impaired as a result of such injury; you may further take into consideration in estimating the damages, if you find that he is entitled to any damages, whether or not he has been deprived, by reason of the negligence of the defendant, of the ability to earn money, and if so, to what extent; and you may also consider whether or not he has been permanently injured, and if so, to what extent; you may also consider his

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mental and physical pain and suffering, past, present, or future, if any, occasioned by his injuries, and in your dispassionate judgment allow him such sum as will fairly compensate him insofar as the evidence may here show you he is entitled to damages in these respects." The giving of this instruction is not challenged by defendant's assignments of error, and under it, and the evidence, we are not justified in holding that the amount of the verdict, while large, was the result of passion or prejudice, or that it awarded to the plaintiff other than compensatory damages; hence, we do not hold that the damages awarded are excessive. Fixing the amount of damages in a case of this kind is a matter within the discretion of the jury (Sec. 2378 R. L. 1915) whose verdict will not be interfered with by the court, unless it is so excessive and outrageous, when considered with reference to the circumstances of the case, as to demonstrate that the jury have acted against the rules of law, or have suffered their passions or prejudices to mislead them. (13 Cyc. pp. 121, 124 and authorities cited in notes.)

We have carefully examined the record with reference to all of the errors assigned which were not abandoned, and find no reversible error, either in the admission or rejection of evidence, nor in the instructions, and are of the opinion that the judgment should be affirmed, with costs to plaintiff (defendant in error), and it is so ordered.

Affirmed.

E. W. Sutton and W. L. Stanley (Smith, Warren, Hemenway & Sutton and Holmes, Stanley & Olson on the brief) for plaintiff in error.

E. A. Douthitt (Douthitt & Coke on the brief) for defendant in error.

CONCURRING OPINION OF WATSON, J.

I concur in the conclusion arrived at by the majority that the judgment should be affirmed with costs to plaintiff (defendant in error).

Touching the question of the proximate cause of plaintiff's

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injury and the propriety of the trial court's action in submitting this issue to the jury, whatever my views might be upon this question as an original proposition, I am of the opinion that the decision of this court on the former writ of error (ante, p. 66), where the same question was considered and decided, became the law of the case and is not now open for re-examination. On the former hearing the position of this court on the question of proximate cause is expressed in the syllabus as follows:

"The defendant having negligently continued the use of a defective cable on its coal conveyor which, by reason of its defective condition, came off certain pulleys designed to hold it in position, and the plaintiff, an employee of the defendant on the conveyor, in attempting to restore the cable to its proper position was injured. The question, whether the proximate cause of the plaintiff's injury was the negligence of the defendant in failing to furnish a reasonably safe cable for use, is not a question of science or legal knowledge, but a question of fact for determination by a jury."

From this it appears that the court expressly held that the plaintiff's evidence bearing on the question of proximate cause (which evidence was substantially the same on the second trial) was sufficient to carry the case to the jury, and in my opinion it must now be held that the conclusion arrived at then must be the law in this case. What was there decided is not now open for discussion and must be held to be *res adjudicata*. In my opinion this question involved the only substantial defense relied on by the defendant, and unless the court has committed error in the instructions or has admitted or rejected evidence which was prejudicial to the defendant's case the judgment will have to be affirmed.

Counsel for plaintiff in error strongly urge that the former ruling of this court on the question of proximate cause may and should be re-examined on this second writ of error, and, conceding that the view contended for by them is that adopted by the minority of the state courts, cite the case of *Hastings v. Foxworthy*, 45 Neb. 676, 34 L. R. A. 321, decided by the supreme

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court of Nebraska in 1895, as holding that an appellate court on a second appeal may and should examine and reverse its rulings made on the first appeal when the opinion first expressed is manifestly incorrect. I am of the opinion that the *Foxworthy* case is of little value as an authority in considering the case at bar. In that case (34 L. R. A. 335) the court distinctly states:

"So far as any express decision or actual consideration of the question is concerned, it has never arisen in this case, and following the decision in * * * the question must be solved in favor of the contentment of the city unless by *implication* it has formerly been otherwise resolved in this case, and unless, further, the court is bound by such *implied* decision so far as this case is concerned."

Again, on page 336, it is said: "The court may be said to have already three times *impliedly* decided the question now before us * * * *although on no occasion was that question, in fact, considered or actually decided.*"

In the case at bar the question sought to be re-examined has been considered and expressly decided. If not expressly overruled, the doctrine laid down in the *Foxworthy* case seems to have been abandoned or repudiated by the supreme court of Nebraska. In the case of *Smith v. Neufeld*, 61 Neb. 699, decided by the supreme court of Nebraska in 1901, the court, in discussing the doctrine of law of the case, on page 701, says:

"Following an almost unbroken line of authorities in other jurisdictions this court in a number of early cases held that when a question in controversy has been once squarely decided, the decision, if acquiesced in, or if not recalled, becomes the law of the case and is binding upon the parties and those claiming through or under them in all subsequent stages of litigation. This doctrine was, it is true, challenged as harsh and unjust in *City of Hastings v. Foxworthy*, 45 Neb. 676, but it has been reiterated and reaffirmed in many cases since decided and may now be regarded as firmly established in the jurisprudence of this state."

On all of the other questions involved in this second writ of error and discussed in the foregoing opinion I concur with the majority in their reasoning and conclusions.

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CLINTON B. RIPLEY AND LOUIS E. DAVIS, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF RIPLEY & DAVIS, v. KAPIOLANI ESTATE, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED MARCH 22, 1915.

DECIDED MARCH 24, 1915.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE STUART IN PLACE OF WATSON, J., DISQUALIFIED.

APPEAL AND ERROR—*exceptions*.

An exception in the following language, "That thereafter and on to wit: the 14th day of October, 1914, a decision was filed in the above entitled cause by the judge, and to the filing of which decision, the defendant duly excepted and the exception was allowed," brings to the attention of this court no specific question of law presented to the trial court, and is too general to be considered in the appellate court.

OPINION OF THE COURT BY QUARLES, J.

This case was heretofore in this court on exceptions from a verdict and judgment in favor of the plaintiffs, and a new trial was granted on the ground that it was apparent from the record and instructions given by the court, the jury, without evidence to support their verdict, found for the plaintiffs under the first count of their complaint which alleged a special promise, and not under the second count which was upon a *quantum meruit* for service rendered by the plaintiffs to the defendant, as architects. Upon the return of the cause to the circuit court the parties entered into a stipulation in writing whereby the plaintiffs withdrew the first count of their complaint, and the cause was submitted to the court without a jury upon the second count, and upon the evidence taken at the former trial as embodied in the official reporter's transcript, each party reserving the right

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to make objections to the evidence of any witness or any part thereof, and to except to the ruling of the court in sustaining or overruling any objection to any of the evidence. At the trial the defendant, upon certain grounds therein specified, objected to sixty-eight questions propounded by plaintiffs to divers witnesses, all of which were overruled, except as to objection No. 36, and the action of the trial court in this regard is alleged as the ground for defendant's first exception here. The defendant at the trial also moved to strike out divers answers of various witnesses, portions of certain other answers, and the entire evidence given by the witness Arthur Beeton, upon various grounds set forth in sixty-two separate paragraphs, all of which were overruled by the court except as to the matter set forth in the thirty-sixth paragraph, and the action of the trial court in this regard is alleged as the ground for the second exception now before us. We find no error in the court's ruling as to said motions to strike, and objections to the evidence mentioned in the said motions.

The remaining exceptions are in words and figures as follows, to wit:

"EXCEPTION No. 3. That thereafter and on to wit: the 14th day of October, 1914, a decision was filed in the above entitled cause by said judge, and to the filing of which decision, the defendant duly excepted and the exception was allowed."

EXCEPTION No. 4. That thereafter, and on to wit: the 19th day of October, 1914, judgment was entered in the above entitled cause by the Clerk of said Court and to the entering of such judgment, defendant duly excepted and the exception was allowed."

These two last exceptions are too general and indefinite to be considered. In a long line of decisions this court has held that exceptions must be sufficiently definite and specific to call to the attention of this court a point of law which was called to the attention of the trial court affecting the legality of its ruling, thus giving the lower court the opportunity to correct its ruling if erroneous. "The object of an exception as contemplated by

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the statute is to bring to this court a specific question of law upon which the trial court has erroneously ruled to the prejudice of the party excepting, and not to enable a party to cast the entire case upon the court for review. Such a loose method of practice is unfair to both the opposite party and the court. See *Spencer v. Dodd*, 7 Haw. 200; *Ahlo v. Aiau*, 8 Haw. 70; *Curry v. Porter*, 125 Mass. 94; *Harriman v. Sanger*, 67 Me. 442." (*Fraga v. Portuguese Mut. Ben. Soc.*, 10 Haw. 128, 129.) "Counsel have no right to cast the burden on the court of searching through a voluminous record to find the ground of his objection and where the errors complained of are not squarely presented by the bill of exceptions, as in this exception, we shall follow the practice of this court and refuse to consider them." (*Mist v. Kapiolani Estate*, 13 Haw. 523, 526.) "The only exception under which it could have been raised is the general exception to the judgment and decision as contrary to the law and the evidence, and this exception is too general to bring to this court a question of law which has not been called to the attention of the court below and made the subject of a ruling." (*McCandless v. Honolulu Plantation Co.*, 19 Haw. 239, 242, citing *Territory v. Puahi*, 18 Haw. 649.) "A further contention is, that the trial judge fails to comply with the requirements of Act 117, Laws of 1909, which provides that the 'court shall hear and decide the cause, both as to the facts and the law, and its decision shall be rendered in writing stating its reasons therefor.' The sufficiency of the decision in this respect was not questioned in the lower court. It is now questioned for the first time in this court. No proper exception to the decision was saved. The exception taken was, that the defendants 'except to the decision' of the court. This was not sufficient to raise the question as to the sufficiency of the decision rendered. *Kaehu v. Namealoha*, 20 Haw. 350. One of the essential purposes of an exception is, that the attention of the trial court is thereby specifically called to a particular point of law going to the legal sufficiency of the ruling made, thus affording

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the court an opportunity to correct the supposed error. The opportunity was not given to the court by the exception taken in this case." (*Scott v. Kona Development Co.*, 21 Haw. 258, 263.)

We are of the opinion that the exceptions should be overruled, and it is so ordered.

Exceptions overruled.

W. B. Lymer (*Thompson & Milverton* with him on the brief) for plaintiffs.

J. Lightfoot for defendant.

J. ALFRED MAGOON, TRUSTEE IN BANKRUPTCY
OF THE ESTATE OF MARY H. ATCHERLEY, v.
KAPIOLANI ESTATE, LIMITED, AND J. F.
BROWN.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

HON. S. B. KINGSBURY, JUDGE.

ARGUED MARCH 8, 1915.

DECIDED MARCH 25, 1915.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF WATSON, J., DISQUALIFIED.

WILLS—construction—intent of testator—Hawaiian language.

It is the duty of the court to, if possible, find a meaning for and give effect to the language used to express the intention of a testator, and in construing a will written in the Hawaiian language the court will take a broad view. The Hawaiian word "no," meaning "to" or "for" has always been regarded as operative and sufficient to constitute a devise or bequest when used in a will.

SAME—construction of general and specific provisions.

Where a specific devise conflicts with a general devise it is generally a reasonable presumption that the testator intended that the specific provision would operate upon the property named in it and the general provision upon other property.

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SAME—dower—testamentary provision in lieu of—evidence of acceptance by widow.

Under a statute requiring a widow to make her election to take under a testamentary provision in the will of her husband or be endowed of his lands, the widow will be presumed to have taken her dower unless there is evidence of some unequivocal act on her part showing an election to accept the testamentary provision instead.

SAME—lapsed devise—presumption against intestacy.

Where a specific devise lapsed, held, in order to effectuate the apparent intention of the testator, that title to the property passed to other devisees under a general provision in their favor. The presumption against partial intestacy is a strong one.

DEEDS—construction.

A deed purporting to convey all the right, title and interest of the grantor in and to the estate of his deceased father will pass his title to the property derived by him out of the estate of his father who died testate though the grantor erroneously described himself as an "heir at law."

EJECTMENT—legal and equitable titles—equitable estoppels.

Subject to the exception by which equitable estoppels are admitted the rule is that actions of ejectment deal only with legal titles to land.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is an action of ejectment to recover the land known as Onoulimaloo, on the Island of Molokai, to which the plaintiff claims title in fee simple. The defendant, Kapiolani Estate, Limited, also claims ownership in fee simple, the defendant Brown being its lessee. The case was tried jury waived and judgment was entered in the circuit court for the defendants. The plaintiff brings exceptions. The title relied on by the plaintiff is as follows: A land commission award and patent thereon to one Kinimaka; the will of Kinimaka by which, it is contended, the title passed to the testator's children Kaniu (for life), D. Leleo (for life) and Moses Kapaakea (remainder) in fee simple; deed from Moses Kapaakea Kinimaka to Mary H. Atcherley; and the bankruptcy of Mary H. Atcherley and the appointment of the plaintiff as trustee. On behalf of the Kapiolani Estate, Limited, it is contended that the title to this land

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passed by the will of Kinimaka to the testator's widow, Pai, or went to the testator's children as intestate property by descent; that upon admitted facts of its possession and that of its predecessors in interest continuously since the year 1866 title by adverse possession has been acquired; that no title passed to Mary H. Atcherley by the deed of Moses Kapaakea Kinimaka; and that if it cannot otherwise defeat the plaintiff's claim it is entitled to rely on a certain equitable defense, the particulars of which were in evidence, but which was not passed upon by the circuit court. The court below held that title to the land in dispute did not pass to Mary H. Atcherley by the deed in question. We are of the opinion that the judgment cannot be sustained on the ground upon which the circuit court rested it, and that there must be a reversal.

As to the will of Kinimaka. This will was admitted to probate in 1857. It was written in the Hawaiian language and the translation of so much of it as is necessary to a proper understanding of the case is as follows:

"I therefore make my will, while yet in good health, devising and bequeathing all my property, real and personal, to my heirs, my own children, so that they will have no trouble hereafter, and in order that no one else can hinder, having no rightful claim to the rights and property of my own children.

"Kaniu is to be my first heir, and at her death it descends to D. Leleo, after his death it descends to Moses Kapaakea, these are my heirs:

"This is the amount of my property.

- | | | | |
|---|------------------------------|------------------------------------|-------------------|
| 1 | Ahupuaa Kalahiki | South Kona | Hawaii |
| 1 | " | Onouli Maloo for (Pai that land on | Molokai |
| 1 | " | Maihi for (D. Leleo | North Kona Hawaii |
| 1 | Purchased Land Pahoeheo | (M. Kapaakea | North Kona Hawaii |
| 1 | Kuleana Kalahiki Eleiwa | | South Kona Hawaii |
| 1 | House lot Nalino at Holualoa | " | " |
| 1 | " | Honuakaha | Honolulu Oahu |
| 1 | Kuleana Kauleo adjoining | Maemae | Oahu |
| 1 | " | Umauma | Kapena Oahu |
| 1 | " | Kukui Kaaleo | Oahu |

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Personal Property.

R. Pai 2 horses Onouli Maloo Molokai
D. Leleo 2 horses Maihi North Kona Hawaii
M. Kapaakea 2 horses Pahoehe North Kona Hawaii."

Then continues the list of items of personal property including cattle, horses, household articles, etc., not specifically designated as given to a particular person, and the will concludes with the statement "This is the amount of my property that I give by will as above to my heirs."

The contention advanced on behalf of the plaintiff that the language used by the testator in connection with the ahupuaa of Onoulimaloo was too vague to constitute a devise to Pai, or that, at best, it should be regarded as having been intended to give her only a life estate in the land is not sustained. It is the duty of the court to, if possible, find a meaning for and give effect to the language used to express the intention of the testator, and in construing a will written in the Hawaiian language the court will take a rather broad view. The Hawaiian word "no," meaning "to" or "for," has always been regarded as operative and sufficient to constitute a bequest or devise when used in a will. We find in this will then a general devise to the testator's three children with the remainder in fee simple to the son Moses Kapaakea, and a specific devise of the land in dispute to the widow Pai. The item in the original will reads "1 Ahupuaa Onouli Maloo no (Pai ia aina i Molokai" and we regard it as intended to be a devise of the land to Pai in fee simple in contradistinction to the life estates given to Kaniu and D. Leleo, though without words of limitation as in the devise to Moses, in and by the general clause. Furthermore, the provision for Pai must be regarded as intended as in lieu of dower and in the absence of express words and of any showing of a reason to the contrary it would be supposed that such a provision, covering only one of several pieces of land, would be for a fee simple title. The general devise to the children was subject to the specific devise to Pai and there was no obstacle to

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their both having effect as evidently intended by the testator. Where a specific devise conflicts with a general devise it is generally a reasonable presumption that the testator intended that the specific provision would operate upon the property named in it and the general provision upon other property. *Paiko v. Boeynaems*, ante, p. 240. The next point of contention is involved in the question whether or not the widow accepted the testamentary provision in lieu of her right of dower, for if she did not it is of no moment that there was such a provision in the will. The statute of 1852 which was in force at the date of Kinimaka's death provided that "If any provision be made for a widow in the will of her husband, she shall within six months after probate of the will, make her election or be endowed of his lands; but she shall not be entitled to both" etc. Referring to that statute it was said in *Jacobs v. Cummins*, 4 Haw. 113, "The widow must have done something which showed that she had accepted the provisions of the will. It may have been in open court, it may have been by written renunciation of her dower, or it may have been by receiving and dealing with the property devised to her by her husband." Under such a statute a widow will be presumed to have taken her right under the law unless there is evidence of some unequivocal act on her part showing an election to take the testamentary provision instead. *O'Brien v. Knotts*, 165 Ind. 308, 311; *Reville v. Dubach*, 60 Kan. 572, 576; *Millikin v. Welliver*, 37 Oh. St. 460, 466; *Forester v. Watford*, 67 Ga. 508. The record shows that the will of Kinimaka was admitted to probate upon the petition of the testator's children acting by Robert G. Davis, their next friend. It is argued that the facts that, as shown by the record, the widow appeared in court and stated that she had no objection to make to the will and joined in a request that Mr. John Ii be appointed administrator, and, upon his declining to act, approved of the appointment of G. E. Beckwith, and later, upon the departure of Beckwith from the jurisdiction, petitioned for the appointment of R. Armstrong as administrator with the will

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annexed to complete the administration of the estate, evidenced her election to take under the will. We hold that the acts referred to were not necessarily inconsistent with an intention on the part of the widow to abide by her right of dower and, as matter of law, fell short of such unequivocal conduct as would be necessary to prove an election to accept the testamentary provision. The devise to Pai must, therefore, be held to have lapsed. On behalf of the plaintiff it is contended that in this event the title to Onoulimaloo passed to the testator's children under the general clause designating them as his heirs in the manner set forth. Opposite counsel argue that there was an intestacy and that the title descended to the children as the heirs at law of their father. The question is not free from difficulty. A general residuary clause in a will is a gift of all that is left after the gifts specified or designated have been paid or satisfied, its function being to embrace everything not otherwise effectually given, including lapsed legacies and devises. No particular form of words need be used so long as the testator's intention is shown, nor is it essential that the clause be the last of the disposing provisions. The general language of the provision in favor of the children does not constitute a residuary clause in the sense that it would apply to property belonging to the testator which was not mentioned in the will. But in order to effectuate the apparent intention of the testator to dispose of all the property enumerated in the will the provision should be given the effect of a residuary clause so far as such property is concerned, and this would operate upon the devise to Pai which lapsed upon her failure to accept it. This view is supported by the presumption against partial intestacy which is a strong one. *Bertelman v. Kahilina*, 14 Haw. 378, 382.

As to the deed of Moses Kapaakea Kinimaka. It appears by the agreed facts that D. Leleo died in the year 1884, and Kaniu in 1901. On May 18, 1897, Moses, the remainderman, executed a deed to Mrs. Atcherley, and her heirs, of all his right, title and interest "as one of the heirs at law in and to the estate

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of his father Kinimaka deceased." Counsel for the Kapiolani Estate contends that if title to this land passed to Moses by and under the will that this deed did not convey that title to Mrs. Atcherley as it purports to have been executed by the grantor as an heir at law whereas he was a devisee under the will. There is no merit in the argument of counsel that the deed purports to convey only property acquired by the grantor as an heir of his father. The deed conveyed all the right, title and interest of the grantor "in and to the estate of his father Kinimaka deceased," and the fact that the grantor described himself as "one of the heirs at law" instead of a devisee under the will is of no importance. We know of no reason why the manifest intent of the grantor to convey all his interest in the property derived by him out of the estate of his father should not be held to have been carried out.

As to the defense of adverse possession. This defense would have been available if under a proper construction of the will of Kinimaka it should have been held that there was an intestacy as to the land in dispute and that the title had vested in the children by descent. But as the children took title under the will the statute of limitations did not begin to run against Moses Kapaakea or his grantee until the death of Kaniu, and as the action was commenced within ten years after her death, the defense fails. *Atcherley v. Lewers & Cooke*, 18 Haw. 625.

As to the alleged equitable defense. The final contention of counsel for the Kapiolani Estate is that the defendant had the right to show, and did show, as a complete defense to this action, an equitable title to the land. The title referred to has been the subject of controversy in previous cases in this court involving other land. *Kapiolani Estate v. Atcherley*, 21 Haw. 441. The substance of this defense is this: That the chiefess Kaniu was the owner, in so far as rights of property in land existed or were recognized in these islands prior to the establishment of the land commission, of certain lands, including Onoulimaloo, which she devised to her foster son David Kalakaua by

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oral will which was duly proved and probated in the year 1858, she having died in 1843; that the testatrix' husband Kinimaka was appointed guardian of Kalakaua who was then a minor; that it became and was the duty of Kinimaka, as such guardian, upon the organization of the land commission, to present to the commission the claim of his ward for an award of the title to this land; that Kinimaka presented a claim for title in his own name and received an award therefor upon which, as already stated, a patent was subsequently issued in his name; that Kalakaua, upon reaching his majority, in a suit in equity instituted against Kinimaka's children and his widow in 1858 averring these facts, obtained a decree directing a conveyance to be made to him of the title to the land, but that no such conveyance appears to have been made. The contention is that in the event of its being held that the plaintiff in this action has the legal title to the land in dispute the defendants are nevertheless entitled to judgment under this showing of the equitable title. Such a defense would probably be available in a jurisdiction in which the reformed procedure under the code system has been adopted, but we are of the opinion that it must be held otherwise where, as in this Territory, the distinction has been preserved between law and equity and in the administration of legal and equitable remedies. The fact that in this jurisdiction equitable estoppels may be set up by way of defense in actions at law, and have often been allowed in actions of ejectment, is urged as a reason for permitting the assertion of the equitable claim in this case. The doctrine of equitable estoppel was long ago incorporated into the law and has been constantly employed by courts of law in the decision of legal controversies. 2 Pom. Eq. Jur. (3d. ed.) Sec. 802; *Kamohai v. Kaehele*, 3 Haw. 530; *Hayseiden v. Wahineaea*, 10 Haw. 10; *Goo Kim v. Holt*, 10 Haw. 653; *Haw. C. & S. Co. v. Kahului R. Co.*, 12 Haw. 85. On the other hand, such a right as that to show that a deed absolute on its face was intended to be a mortgage may not be availed of in an action at law. Warvelle on Ejectment,

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Sec. 262; *Okuu v. Kaiaikawaha*, 7 Haw. 311; *Ah Hoy v. Raymond*, 19 Haw. 568. But the case at bar does not present a claim of an equitable estoppel. There was no representation or conduct on the part of one which caused another, relying thereon, to change his position. The right of Kalakaua, upon reaching his majority, was the right to have from his guardian an accounting and the transfer to himself of the legal title to his land which stood in the name of his guardian. It was upon this theory that the Kapiolani Estate brought suit in 1902. *Kapiolani Estate v. Atcherley*, 14 Haw. 651; 21 Haw. 441. The title sought to be set up here by way of defense is in its very nature purely equitable and of the kind which, because of the refusal of the law courts to recognize such, gave rise to the equitable jurisdiction over trusts. "In the case of a trust created in lands, the estate of *cestui que trust* is purely an equitable one, of which law courts refuse to take cognizance." 1 Pom. Eq. Jur. (3d ed.) Sec. 219. "To enable a party not in possession to maintain a bill to quiet title he must have an equitable title, *one that cannot be enforced at law.*" *Kapuakela v. Iaea*, 9 Haw. 555, 558. See *Kidwell v. Godfrey*, 14 Haw. 138. Assuming the fact to be that the Kapiolani Estate would, through a suit in equity, be entitled to have the legal title of this land conveyed to it, it is of no assistance as a defense in this case. Subject to the exception by which equitable estoppels are admitted the rule is that actions of ejectment deal only with legal titles to land.

The exceptions to the overruling of the motion for a new trial, and to the decision and judgment, which are now reversed and set aside, are sustained. A new trial is granted and the cause remanded to the circuit court.

J. A. Magoon and *P. L. Weaver* for plaintiff.

J. Lightfoot for Kapiolani Estate, Limited.

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NO. 828. GEORGE E. SMITHIES *v.* DAVID F. NOTLEY; WILLIAM HENRY, TRUSTEE OF DAVID F. NOTLEY, THEO. H. DAVIES & CO., LTD., AN HAWAIIAN CORPORATION, AND WILLIAM T. RAWLINS, GARNISHEES. Exceptions from Circuit Court, First Circuit. Hon. W. J. Robinson, Judge. Argued March 23, 1915. Decided March 26, 1915. Robertson, C.J., Watson and Quarles, JJ. Per curiam. Exceptions by plaintiff in an action of *indebitatus assumpsit* to recover on three certain promissory notes made by the defendant, Notley, in favor of the Bank of Hawaii, Limited, and by the said Bank of Hawaii, Limited, endorsed to the plaintiff. The only exception set forth in the bill is one to the ruling and order of the trial court discharging the garnishees, William Henry, trustee of David F. Notley, and William T. Rawlins, based on the ground that said ruling and order was contrary to the law and the evidence and the weight of the evidence and the disclosures made upon oath by said garnishees. But the evidence is not made a part of the bill by reference or otherwise; and, indeed, although a transcript of the evidence appears among the papers sent up, it was not even filed in the court below. It is established in this court by a long and unbroken line of decisions that a transcript of evidence, not made a part of the bill of exceptions by reference or otherwise, cannot be considered. *Kalamakee v. Wharton*, 19 Haw. 472; *Territory v. Ah Moon*, 14 Haw. 203, 204; *Keliilihune v. Vierra*, 13 Haw. 28; *Kaleialii v. Kekuawela*, 7 Haw. 386; *Ah Chu v. Sung Kwong Wo Co.*, 5 Haw. 291; *Ikalua v. Kopaea*, 4 Haw. 198. Without a transcript of the evidence it is, of course, impossible for us to say that the making of the order discharging the garnishees was erroneous as a matter of law. The exceptions are overruled.

G. A. Davis for plaintiff.

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ARTHUR A. AKINA v. JOHN K. KAI.

RESERVED QUESTION FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

HON. C. F. PARSONS, JUDGE.

ARGUED APRIL 8, 1915.

DECIDED APRIL 13, 1915.

WATSON AND QUARLES, JJ., AND CIRCUIT JUDGE ASHFORD

IN PLACE OF ROBERTSON, C.J., ABSENT.

PRIMARY ELECTIONS—*Sec. 41, R. L. 1915, construed.*

The proviso contained in Sec. 41 R. L. 1915, to the effect that any candidate at a primary held pursuant to the act who receives the vote of a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate, held to apply to candidates for the office of supervisor where more than one is to be elected.

SAME—same—names to be placed on ballot for general election.

At a primary election where one of the candidates for the office of supervisor in a district where three are to be elected receives a majority of the votes of the registered voters voting at such primary and is thereby elected as a supervisor and there remain but two supervisorial offices for that district to be filled at the ensuing general election, the names of only two candidates from each political party, together with the names of such non-partisan candidates as may have received not less than twenty per cent. of the votes of registered voters cast at such primary, should be placed on the ballot for such general election.

OPINION OF THE COURT BY WATSON, J.

At the primary election held in the county of Hawaii on the 13th day of March, 1915, under the provisions of section 28. Revised Laws, 1915 (Sec. 3, Act 151, S. L. 1913), Arthur A. Akina was a candidate on the republican ticket for the office of supervisor for West Hawaii, from the second representative district. By law it is provided that there shall be elected three supervisors from said second representative district, known as West Hawaii. (Sec. 1512, R. L. 1915.) At said primary

election said Akina was one of the three persons who received the highest vote for the republican nomination for the said office of supervisor, but he received the lowest number of votes of said three leading republican candidates. At said primary election one Julian R. Yates, whose name appeared on the primary ticket as a nominee of the home rule party for said office of supervisor for West Hawaii, received a majority of all the votes cast at said election. Petitioner tendered the necessary fee to the respondent in order to have his name placed on the official ballot for the election to be held on May 4, 1915, which respondent declined to accept. Respondent, county clerk of the county of Hawaii, being the officer charged with the preparation of the ballots for the general election, refuses to have the name of the petitioner placed on the official ballot, claiming that Yates having been elected at the primary election, so held as aforesaid, there are but two supervisory offices from said second representative district to be filled at the general election and that but two names of candidates from each party can now go on the ballot, and claiming further that as petitioner received the lowest number of votes of the three leading republican candidates, petitioner's name should not be placed on the ballot. The petitioner filed in the circuit court his petition for a writ of mandamus to compel the respondent county clerk to print on the official ballot for the approaching general election the name of the petitioner as a candidate of the republican party for the office of county supervisor for West Hawaii, and other relief. An alternative writ issued directing the said respondent to have the name of petitioner placed upon the official ballot as a candidate of the republican party for said office or show cause why he should not do so. To the alternative writ the respondent made return stating in detail the facts as above set out and praying that the alternative writ be discharged and the peremptory writ sought denied. The honorable circuit judge reserved to this court for determination the question, "Shall the peremptory writ herein

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prayed for issue?" The reserved question requires a construction of the proviso to section 41, Revised Laws, 1915. That section provides in part as follows:

"Sec. 41. Result of election. 1. The person receiving the greatest number of votes at a primary as a candidate of a party for an office shall be the candidate of the party at the following election, and any nonpartisan candidate receiving at least twenty per cent. of the votes of registered voters cast at such primary shall also be a candidate at the following election. Provided, however, that any candidate receiving the votes of a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate at such primary."

There is no disagreement between the petition and the return as to the material facts and the same are also made to appear by an agreed statement sent up as part of the record upon the reserved question. In said agreed statement of facts it is stipulated, *inter alia*, "that Julian R. Yates, a candidate for the Home Rule party in the said second representative district, for the office of supervisor in said district, received a majority of all the votes cast at the primary election so held on the 13th day of March, 1915, and by virtue thereof, under the primary law, was duly elected as a supervisor from the second representative district." Counsel for petitioner in this court, in their brief and oral argument, seek to repudiate that portion of the agreed statement above quoted and italicized, claiming that the same constitutes, not an agreed statement of fact but an agreement as to the law and is not binding on the court nor upon counsel in the presentation of the case. They then state their principal contention, that the proviso in section 41 was intended to apply only in cases where but a single officer is to be chosen, such as county attorney, county clerk, sheriff or treasurer. In support of this contention it is argued that the language of the proviso, from a grammatical standpoint, covers only cases where a single person is to be chosen and that if applied to offices where more than one are to be chosen, as for example, to the office of supervisor

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where, as in West Hawaii, three are to be chosen, endless confusion may result in that it is possible where a number of candidates are in the field for more than three of such candidates to receive a majority vote of all the voters voting at the primary election. This may be demonstrated by assuming, for the purpose of illustration only, that in West Hawaii there are 1000 registered voters, all voting, each of whom votes for three supervisors, making a total of 3000 supervisorial votes. In *In re Lightfoot*, 22 Haw. 293, 298, it was held that in order to be elected at the primary, under the proviso referred to, the candidate must receive the vote of a majority of all the voters voting at the primary. In the hypothetical case above stated, where 1000 voters are voting and 501 votes would constitute a majority vote of all those voting at said primary election, it is readily seen that it is mathematically possible for each of five candidates to receive 600 votes,—a majority vote of all the voters voting at said primary; whereas under the law there are but three candidates to be elected.

It is true that the language of section 41 of the Revised Laws, as it refers to nominations, is "*the person* receiving the greatest number of votes," etc., and, as it relates to elections, as distinguished from nominations, is "*any candidate* receiving the votes of a majority of the registered voters," etc. By section 14 of the Revised Laws of 1915, it is provided, however, that "Words in the masculine gender signify both the masculine and feminine gender, and those in the singular or plural number signify both the singular and plural number," etc. The word "candidate," as appearing in the proviso, is used in the same sense as the word "person" in the earlier part of the section, and in our opinion both words are to be construed in the plural number in cases like the one at bar, where there is more than one nomination to be made or more than one office to be filled. Petitioner not claiming to be the person receiving the greatest number of votes at the primary as a republican candidate for the office of supervisor, the very basis of his claim to

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have his name placed on the ballot for the approaching general election must find support in the construction here placed on the language of said section. If the word "person," as used in said section relating to nominations, should be construed, as contended for by counsel for the petitioner, in the singular number, petitioner would have no vestige of a claim of right to have his name placed on the ballot for the general election. We think it is the clear intent of the primary act, to be gathered from the act as an entirety, that each political party shall nominate one candidate for each office to be filled at the general election and that the names of these candidates shall be placed on the ballot at the ensuing general election, and also that it is the intent of the act that any candidate receiving the vote of a majority of the registered voters voting at such primary shall thereby be duly and legally elected to the office for which he is a candidate at such primary. While we recognize the possibility that embarrassments in construing the primary law may hereafter arise, such as those referred to by counsel for petitioner in their brief and argument, we are not in the instant case confronted with any of those questions, and the legislature, which is now in session, may, if it sees fit, so remedy the defects in the act that no necessity will arise for considering the extreme cases suggested by counsel. In any event, we deem it our duty to construe the law as we find it, giving to the language used its usual and ordinary meaning, and, as was said by Chief Justice Robertson, speaking for the court, in *Cooke v. Thayer*, 22 Haw. 247, 249, "We believe no useful purpose would be served by discussing questions which are not necessary to the determination of the case in hand, and may never require a decision, and the solution of which seems not to be needed to assist the executive officers in discharging their duties under the law."

We hold that the proviso in section 41 of the Revised Laws of 1915 was not intended to be confined to cases where but one person could be elected, but that it applies in cases where, as in

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the case at bar, there are more offices than one to be filled; that Yates, having received a majority of the votes cast at the primary election, was duly and legally elected as a supervisor from said second representative district, and that as there remain but two supervisorial offices to be filled from said second representative district at the general election to be held on May 4, the names of only two candidates from each political party, being the ones who received the highest number of votes (less than a majority) at the primary election for such office, together with the names of such non-partisan candidates as may have received not less than twenty per cent. of the votes of registered voters cast at such primary, should be placed on the ballot for such general election.

Our answer to the question reserved is therefore in the negative.

W. L. Stanley and R. W. Breckons (Holmes, Stanley & Olson, H. Irwin and R. W. Breckons on the brief) for petitioner.

I. M. Stainback, Attorney General (W. H. Beers, County Attorney, County of Hawaii, with him on the brief), for respondent.

Territory v. Armstrong, 22 Haw. 526.

TERRITORY OF HAWAII v. WILLIAM F. ARMSTRONG

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED APRIL 1, 1915.

DECIDED APRIL 14, 1915.

WATSON AND QUARLES, JJ., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF ROBERTSON, C.J., ABSENT.

EMBEZZLEMENT—*indictment—allegation and proof.*

A. was indicted charged with embezzling certain bonds which were in his possession by the consent and authority of a certain incorporated lodge, the owner, by converting them to his own use, unlawfully, wilfully, fraudulently and feloniously, and without the consent of such owner. The evidence showed that he was a trustee, and treasurer of the board of trustees, of said lodge, and as such received the bonds, sold them, and used the proceeds: Held that the verdict and judgment of conviction should not be set aside on the ground of variance between allegation and proof.

SAME—*demurrer or motion to quash indictment—waiver.*

If an indictment under section 3934 R. L. 1915, charging embezzlement, be defective in that it fails to allege the fiduciary relation under which property charged to have been embezzled was received by the defendant, *a question not decided*, an objection for that reason should be made by demurrer or motion to quash, prior to plea; and, if not so made, such objection is waived.

EVIDENCE—*embezzlement—proof of existence of corporate owner.*

Evidence, documentary and otherwise, showing that the alleged owner of property charged to have been embezzled is a domestic corporation, and organized as such, is admissible on the trial of one charged with embezzling the property of such corporation.

SAME—*evidence tending to show value.*

Where the indictment charged the embezzlement by defendant of certain bonds owned by one corporation, issued by another corporation, evidence that the latter was incorporated, issued the bonds named in the indictment and secured them by mortgage, is admissible as tending to show that the bonds embezzled were of value.

SAME—*corpus delicti—order of proof.*

Evidence tending to establish the *corpus delicti* should be introduced before admitting declarations made by defendant inconsistent with the facts; and where checks received by the defendant

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as proceeds of securities embezzled were indorsed by him and cashed, his indorsements of such checks should be proven before they are admitted in evidence, but if admitted out of their regular order, and evidence of his indorsements is later introduced, the order of proof becomes immaterial.

SAME—*evidence showing value of embezzled property.*

Evidence showing the market value of property embezzled at the time of the alleged embezzlement is admissible.

SAME—*written declarations of a third party.*

On a trial on the charge of embezzlement, the complaint of a third party in a civil action claiming the property charged to have been embezzled, is not admissible, the same being an *ex parte* declaration which is not competent to prove the ownership of the embezzled property.

CONSTITUTIONAL LAW—*indeterminate sentence statute.*

Section 3843 R. L. 1915, does not impinge upon the power and discretion vested in the court by section 81 of the Organic Act, is within the legislative power, and is not unconstitutional.

OPINION OF THE COURT BY QUARLES, J.

The defendant, appellant here, was indicted charged with the crime of embezzlement committed at the city and county of Honolulu, Territory of Hawaii, tried before a jury, convicted, and sentenced to a term of two years imprisonment. The charging part of the indictment, after formal averments, is as follows: " * * * the said William F. Armstrong, being then and there entrusted with, and having the possession, control, custody and keeping of a thing of value, to wit, those certain bonds of the Olaa Sugar Company, Limited, numbered respectively No. 989, No. 990, and No. 991, each for the amount of one thousand dollars, of the total aggregate value of three thousand dollars, by the consent and authority of Honolulu Lodge No. 800 Loyal Order of Moose of the World, a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii, the owner thereof, of the money and property of the said Honolulu Lodge No. 800 Loyal Order of Moose of the World, unlawfully, wilfully, fraudulently and feloniously did convert and dispose of the same to his own use and benefit, without the consent and against the will of the said owner

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thereof, and did then and thereby commit the crime of embezzlement, contrary to the form of the statute in such case made and provided." The evidence shows that defendant was one of the trustees, and treasurer of the board of trustees, of said lodge, which was duly incorporated under the laws of the Territory of Hawaii, and, as such trustee, received the said described bonds, owned by the lodge, sold them, and converted the proceeds thereof to his own use. At the close of the trial counsel for defendant moved that he be discharged, and that the court instruct the jury to find for the defendant, on the ground of variance between allegation and proof, the indictment charging that he embezzled the bonds as an individual; while the proof tends to show that if such crime was committed, that it was committed by defendant in an official capacity. The motion to discharge, and the motion to instruct the jury to find for defendant, was each overruled. The first exception is to the action of the court in overruling said motions. The specific contention of the defendant is that in order to sustain a conviction under the evidence, the indictment should have charged that the defendant "as treasurer of the Board of Trustees of Honolulu Lodge No. 800 Loyal Order of Moose of the World" received said bonds and embezzled them. This contention is based upon the idea that the fiduciary relation of the defendant, whether direct or indirect, is an essential element of the crime charged against the defendant; and, being such, it is necessary to allege this fiduciary relation in accordance with the facts. It will be noted that the indictment substantially follows the statute (R. L. 1915, Sec. 3934), and this is usually held sufficient. The statute is as follows:

"If any person who is intrusted with, or has the possession, control, custody or keeping of a thing of value of another, by the consent or authority, direct or indirect, of such other, without the consent and against the will of the owner, fraudulently converts or disposes of the same, or attempts so to convert or dispose of the same, to his own use and benefit, or to the use

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and benefit of another than the owner or person entitled thereto, he is guilty of the embezzlement of such thing."

The indictment in question unmistakably charges the defendant with having the possession, control, custody and keeping of the bonds in question, "by the consent and authority of Honolulu Lodge No. 800 Loyal Order of Moose of the World, * * * the owner thereof," a conversion to his own use, and that such conversion was without the consent of the said owner. It would, undoubtedly, have been good pleading to have alleged that "as treasurer of the Board of Trustees of Honolulu Lodge No. 800 Loyal Order of Moose of the World" the defendant had possession, etc., and if our statute had been drawn in the usual phraseology in which we find similar statutes, i. e., "Every servant, agent, clerk," etc., "entrusted with," etc., the question would be different. In the case of *De Leon v. Territory*, 9 Ariz. 161, the indictment did not state the purpose with which the defendant was entrusted with the alleged embezzled property, for which reason it was contended the indictment was defective. The court, at page 168, said: "It is frequently the case that money or property is intrusted to a person generally for the use and benefit of another person, without any particular use or purpose being in mind at the time the property is intrusted to the agent or person who afterwards embezzles it. To adopt the argument of the appellant in the case at bar would render it impossible to convict an embezzler who might appropriate to his own use trust funds in every such instance, and minimize the beneficial effect of this statute by confining its operations to those cases only in which the money had been intrusted to him for some specific purpose, and that specific purpose be susceptible of proof." The indictment charged, and the evidence established, that defendant was entrusted with the bonds by the consent and authority of the owner; and that he fraudulently converted the same to his own use without the consent of said owner. If we admit, which we do not, that the indictment was defective in that it did not allege the capacity in which the defendant re-

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ceived possession of the bonds, yet, such defect was apparent on the face of the indictment, and that question should have been raised by demurrer, or motion to quash before pleading to it. Failure to object to the indictment on the ground mentioned, prior to plea, waived such objection (R. L. 1915, Sec. 3808).

Exceptions 2, 15, 24 and 25 were disallowed by the trial court.

Exceptions 3 to 8 inclusive are to the instructions given by the trial court at the request of the prosecution, are general in their nature and suggest no error in either of the instructions. The brief on behalf of defendant does not point out any error in either of the instructions. However, we have carefully examined the instructions with reference to the evidence introduced before the jury, and find no error in them.

Exceptions 9 to 47 inclusive are to the action of the trial court in admitting and rejecting evidence. Owing to the nature of these exceptions we feel compelled to discuss them generally, grouping them into classes. One class challenged the admission of the articles of incorporation of Honolulu Lodge No. 800 Loyal Order of Moose of the World, and other evidence showing its corporate organization, on the ground that there was no evidence to show that the lodge was authorized to act, or chartered by the Supreme Lodge of the Loyal Order of Moose of the World. The admission of such evidence was not error. The alleged owner of the property charged to have been embezzled, was a domestic corporation, an artificial person, having, as such, a legal entity; capable of owning the property alleged to have been embezzled, whether it was working under a charter from a supreme or other lodge of the order with which it might, or might not, have been affiliated.

Another class of exceptions was to the admission of documentary and other evidence tending to prove that the Olaa Sugar Company, Limited, was incorporated; that it issued the bonds in question, and secured the said bonds by mortgage upon

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certain property. Such evidence was admissible as tending to show that the bonds alleged to have been embezzled were of value.

Other exceptions touch the admissibility in evidence of the by-laws of the alleged corporate owner of the bonds alleged to have been embezzled; showing who the officers and trustees of said corporation were at the time of the alleged embezzlement; and how the defendant came into possession of the said bonds. All of such evidence was admissible, tending as it did to establish the organization of the corporate owner of the bonds, and the circumstances under which defendant held them.

Some of the exceptions challenge the admission of certain declarations made by defendant to the witness Leithead, in San Francisco, to the effect that he left the bonds in the office of the Honolulu Lodge No. 800 Loyal Order of Moose in the Progress Block in Honolulu, there being then no evidence of the *corpus delicti* before the jury. The natural order of proof would have postponed the introduction of such evidence until the *corpus delicti* had been proven. Yet, as proof was thereafter introduced showing that defendant sold the bonds in Honolulu, receiving something more than \$1800 for them, the order in which the said declarations were proven became immaterial, and defendant was not prejudiced thereby.

Some of the exceptions were to the admission in evidence of certain receipts given by defendant to the Trent Trust Company for the proceeds of the bonds charged to have been embezzled; the introduction of a deposit slip, and drafts for the money deposited and drawn out of bank by defendant, on the ground that the *corpus delicti* had not been proven. There was evidence showing that the bonds in question were placed by the defendant with said Trent Trust Company, as broker, for sale; that said broker sold said bonds for defendant, and paid the proceeds, less its commission, to the defendant; and, that defendant deposited one check received by him with Bishop & Company, bankers, to his own account, afterwards drawing it out, taking

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a bill of exchange on a California bank therefor in his own name; and that he cashed another check received by him from said broker as proceeds for the sale of one of the bonds alleged to have been embezzled by him. There was no error in the admission of any of this evidence. It, with other evidence, tended to establish the *corpus delicti*, tended to show the conversion by the defendant, and the intent of the defendant in converting the bonds.

The witness Heiser identified the checks received by the defendant for the proceeds of the three bonds, whereupon the checks were received in evidence over the objection of defendant that the endorsement of defendant's name on the checks had not been proven. Evidence was afterwards introduced tending to prove the endorsements on the checks to have been in the handwriting of the defendant. Here, as in case of the declaration of the defendant, hereinbefore mentioned, the order of proof became immaterial when evidence proving all the material facts was introduced. It was error to admit the checks and the endorsements thereof before the evidence was offered tending to prove that the checks were indorsed by the defendant, but defendant was not prejudiced thereby.

Some of the exceptions were to the admission of evidence tending to show the value of the bonds at the time they were sold, showing that they sold for the aggregate of \$1875, or \$625 each, and that that price was, at the time, their market value. The admission of such evidence was proper.

Other exceptions were to the action of the trial court in admitting evidence tending to show that the defendant did not return the said bonds, nor the proceeds thereof, or any thereof to said corporate owner. There was no error in admitting such evidence.

Other exceptions were to the action of the trial court in refusing to admit evidence tending to show that Honolulu Lodge No. 800 Loyal Order of Moose of the World had been supplanted by Honolulu Lodge No. 1, Modern Order of Phoe-

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nix, which claimed said bonds and which brought a suit against the Trent Trust Company, said broker, to recover the said bonds. The court properly rejected such evidence. There was no evidence showing that Honolulu Lodge No. 800 Loyal Order of Moose of the World had ceased to exist, or that it had sold the bonds, or parted with the title thereto, and evidence showing that another lodge claimed the bonds and had brought suit for the same was not competent. The complaint in such suit was properly rejected on the ground that it was an *ex parte* declaration, and did not tend to show that title to the bonds had passed out of the alleged corporate owner prior to the embezzlement.

For the reasons herein indicated the exceptions to the verdict and judgment, and the refusal of the court to grant a new trial, on the ground that the evidence was insufficient, and the verdict and judgment were contrary to evidence, must be overruled. The jury were justified in finding from the evidence before it all of the material facts alleged in the indictment.

We now come to a consideration of defendant's exception to the sentence upon the ground that it is illegal and contrary to law. The sentence was specific, imposing a term of imprisonment for two years, and did not fix a minimum sentence as required by the indeterminate statute. The indeterminate statute, enacted in 1909 and amended in 1911, is now chapter 216 Revised Laws 1915. It provides, except in certain cases, that when a person is convicted of a felony, the court shall not fix the duration of the sentence, but that the term of imprisonment shall not exceed the maximum nor be less than the minimum term prescribed by law for the crime for which the person was convicted and sentenced; that where the maximum sentence is in the discretion of the court may be for life or any number of years, the court shall fix the maximum sentence; and in all cases in which no minimum sentence is prescribed by law the court shall fix such minimum sentence, which minimum sentence shall not be more than five years. Other sections provide for a system of credits to a convict on account of good behavior,

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for his parole after serving the minimum sentence fixed by statute or by the court, for his final discharge after the expiration of six months of his parole when his conduct during parole has been satisfactory to the warden, who makes report thereof to the attorney general, together with the record of the prisoner, and the attorney general in turn reports to the governor, who is authorized to order the prisoner's final discharge. The trial court held the said indeterminate sentence law to be unconstitutional in that it impinges upon the judicial power and discretion vested in the trial court, contrary to the provisions of section 81, of the Organic Act, which provides: "That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish."

Our indeterminate statute is, in all essential features, the same as those of Illinois, Indiana, Iowa, Michigan, New York, Nevada, Pennsylvania and other states, and which have been held constitutional and valid in all of them, with two exceptions. In an early case in Michigan, *People v. Cummings*, 88 Mich. 249, the statute was held to be unconstitutional in that it interfered with the power of pardon as it was vested in the governor by the constitution of that State. The people thereafter amended their constitution so as to authorize such a statute, and it has been in full force in Michigan for many years. In *Ex parte Marshall*, 161 S. W. 112, the criminal court of appeals of Texas held an indeterminate statute void upon the ground that "it is so indefinitely framed, and of such doubtful construction, that it is impossible to ascertain its meaning." Texas has since adopted another indeterminate sentence law, and is enforcing it.

Modern science, and continued efforts of philanthropists, have labored to the end that persons unfortunate enough to be convicted of crime should have opportunities for reforming, and remodeling their lives; to the end that punishment shall be largely divested of the vindictive spirit, and convicts induced

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to render obedience to law as well as the interests of society. "While it is the purpose in these days of broader views of the duty of society towards its individuals to remove from the criminal law the vindictive spirit, so far as such may safely be done without impairing the rights of the people as a whole and as individuals, yet such purpose is not of such strength as to give to the courts the power of legislation" (*McKinnon v. Sanders*, 143 N. W. 407).

The courts of the many states that have adopted the indeterminate sentence law hold that it does not interfere with the judicial power of the courts, does not interfere with judicial discretion, does not interfere with the power of the governor to grant pardons, and is not unconstitutional (*Commonwealth v. Kalck*, 239 Pa. St. 534; *Bloom v. State*, 155 Ind. 294; *Miller v. State*, 149 Ind. 607; *Wilson v. State*, 150 Ind. 697; *Vancleave v. State*, 150 Ind. 273; *Shular v. State*, 160 Ind. 300, 310; *George v. People*, 167 Ill. 447; *People v. State Reformatory*, 148 Ill. 413; *People v. Deluce*, 237 Ill. 541; *People v. Joyce*, 246 Ill. 124; *In re Howard*, 72 Kan. 273; *Commonwealth v. Brown*, 167 Mass. 144; *People v. Adams*, 176 N. Y. 351, 362; *Wilson v. Commonwealth* (Ky.), 132 S. W. 557; *State v. Peters*, 43 Ohio 629; *State v. Dugan*, 84 N. J. L. 603).

In the last case cited, the court, at page 609, said: "The argument addressed to us is that the fixing of a sentence is a judicial and not a legislative act, and therefore the act of 1911, which attempts to fix the sentences to be imposed, is an assumption of judicial power—an encroachment upon the constitutional provisions invoked. The foundation underlying the argument is palpably unsound. The pronouncing of a sentence is, undoubtedly, a judicial act. But the punishment which the sentence pronounces comes from the law itself. As Blackstone truly expressed it, under head of 'Judgment and its Consequences,' 'the court must pronounce that judgment which the law hath annexed to the crime.' It is further said that the statute in effect curtails the judicial discretion to be exercised by

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the judge. Granting that it does, it is, nevertheless, the valid exercise of legislative power under the constitution over crimes." Under the authorities, apparently unanimous, and in accord with the progressive spirit of the times, we are constrained to hold that our indeterminate statute is a valid exercise of legislative power, and constitutional.

We hold that the sentence, while it fails to fix a minimum of the term of imprisonment, is not void, but erroneous. The maximum fixed by the statute (R. L. 1915, Sec. 3935), ten years at hard labor, enters into and becomes a part of the sentence, as though incorporated therein, notwithstanding any statement in the sentence to the contrary (*In re Setters*, 23 Ida. 270; *Ex parte Duff*, 141 Mich. 623; *People v. State Reformatory*, 148 Ill. 413; *Miller v. State*, supra; *Ex parte Melosevich* (Nev.), 133 Pac. 57; *Adams v. Barr* (Iowa), 134 N. W. 564; *Ex parte Evans* (Mich.), 138 N. W. 276). The sentence is erroneous in that it does not fix the minimum term of imprisonment of the defendant, a right which the defendant has under the law. The proceedings being regular and free from prejudicial error, the verdict authorized by the evidence, and the defendant having had a fair trial, the error in the sentence may be corrected (*In re Richards*, 150 Mich. 421; *In re Howard*, supra; *People v. Coleman*, 251 Ill. 497; *Martoni v. State* (Tex. Crim. Apps.), 167 S. W. 349). "Where there is no reversible error except that, in sentencing, the lower court has exceeded its power or imposed a sentence which is vague and indefinite, the appellate court on a reversal will not order a new trial, but will remand the case to the trial court for the imposition of a proper judgment and sentence" (12 Cyc. 942).

Following the precedent established in the case of *Territory v. Savidge*, 14 Haw. 286, the judgment imposing sentence against the defendant is set aside, and the case is remanded to the circuit court with instructions to render judgment sentencing the defendant pursuant to the provisions of the indeterminate sentence law (Sec. 3843, R. L. 1915).

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J. W. Cathcart, City and County Attorney (E. C. Peters with him on the brief) for the Territory.

I. M. Stainback, Attorney General, at the request of the court, filed a brief for the Territory.

G. A. Davis for defendant.

CONSOLIDATED AMUSEMENT COMPANY, LIMITED,
AN HAWAIIAN CORPORATION, v. WILLIAM P.
JARRETT, HIGH SHERIFF OF THE TERRITORY
OF HAWAII.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED MARCH 29, 1915.

DECIDED MAY 13, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

REPLEVIN—right of possession—evidence.

In an action of replevin for goods and chattels alleged to have been unlawfully taken and detained, where plaintiff proves ownership and possession at the time of the alleged unlawful taking he has made out a *prima facie* case, and the burden of proving any special right of possession in himself is on the opposite party.

SAME—same—justification.

Where a sheriff or party seeks to justify the taking of personal property by virtue of an execution issued upon a judgment, the judgment record and execution must be produced and a levy shown under it.

OPINION OF THE COURT BY WATSON, J.

Replevin by the appellant for certain office furniture and chattels alleged to have been unlawfully taken and detained from it by the appellee, William P. Jarrett, high sheriff of the Territory of Hawaii. What the answer was does not appear from the record sent up, but in the briefs of both counsel for the appellant and appellee it is stated to have been a general denial, which, under our practice (Sec. 2369, R. L. 1915) was

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no doubt sufficient to permit the defendant to show that he had taken the property as an officer upon process. See also Wells on Replevin, Sec. 301; 20 A. & E. Ann. Cas., 299.

On the trial plaintiff introduced evidence tending to prove that it was the owner of the goods replevied and that such goods were in its possession on the day of November, 1914, when defendant "levied" on the same. There was no evidence of the nature of the writ under which the so-called "levy" was made. The writ itself was not given in evidence nor its absence accounted for. Indeed, there was no evidence that the goods were taken from the plaintiff by the defendant, as an officer, by virtue of any writ, other than the incidental statement of the witness of plaintiff, above referred to, that the defendant on the date named had "levied" on the goods. The defendant showed no title to the property and in no way justified the taking, notwithstanding which the magistrate gave judgment in his favor. From this judgment plaintiff appealed to this court on points of law, the points stated being, (1) the court erred in giving judgment for the defendant; (2) plaintiff having proved its ownership, possession and the taking of the property by the high sheriff of the Territory of Hawaii under execution, it became incumbent upon defendant to show that such taking was lawful, and this he failed to do. It is our opinion that the appellant (plaintiff below) having proved its ownership and prior possession, made out a *prima facie* case and the burden of proving any special right in himself was on the opposite party (the defendant below). *Cassel v. The Western Stage Co.*, 12 Ia. 47, 49; *Kebabian v. Adams Express Co.*, 27 R. I. 564; *Morris v. Danielson*, 3 Hill (N. Y.) 168. "Where the plaintiff is able to show that the defendant was taking away property of which he had just before been in possession, claiming to own it, it is sufficient, at least, to put the defendant upon proof of his title or right to possession, and in the absence of such proof the plaintiff will be entitled to recover." Wells on Replevin, Sec. 109;

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3 Elliott on Evidence, Sec. 2608; *Ingersoll v. Emerson*, 1 Ind. 76. "The admitted quiet and peaceable possession of the property by plaintiffs at the time of the seizure was *prima facie* evidence of title and threw the burden of proof upon the defendant of establishing the contrary." *Schulenberg v. Harri-man*, 21 Wall. (U. S.) 44, 59. An allegation of right of possession is proved by evidence of ownership of the property where no special right of possession is shown in the opposite party. *Cassel v. The Western Stage Co.*, *supra*.

Counsel for the appellant and appellee have throughout their briefs proceeded on the idea that the evidence showed a taking by the defendant, as an officer, under a writ of execution, in which the appellant (plaintiff below) was named as defendant. This assumption is not borne out by the evidence, but assuming it to be the fact, the justification is not sustained by the evidence. "There is a distinction to be observed * * * between an action against the officer in trespass, and an action for the goods. An execution regular on its face, issued by a court of competent jurisdiction, will protect an officer in an action of trespass brought against him by the defendant named in the writ, but it cannot be made the basis of a claim of right to the property without proof of a valid judgment to sustain it." Wells on Replevin, Sec. 263. A valid execution and judgment must be given in evidence. Wells on Replevin, Sec. 302; *Adams v. Hubbard*, 30 Mich. 104; *Underhill v. Reinor*, 2 Hil-ton (N. Y.) 319; *Beach v. Botsford*, 1 Doug. (Mich.) 199; 24 A. & E. Enc. L. (2 ed.) 499, 500. "Where a sheriff or other officer seeks to justify the seizure of personal property under an execution, it is essential that upon the trial the execution be produced, or its absence accounted for." Murfree on Sheriffs, Sec. 929; *Bridges v. Layman and another*, 31 Ind. 384, 386.

The judgment is reversed and the case remanded for a new trial to be not inconsistent herewith.

J. A. Magoon for plaintiff.

E. A. Douthitt for defendant.

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WONG TIN LOOK *v.* GOO WAN HOY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED MARCH 25, 1915.

DECIDED MAY 15, 1915.

ROBERTSON, C. J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD
IN PLACE OF WATSON, J., DISQUALIFIED.

PRINCIPAL AND SURETY—*attachment bond—parties.*

B. sued five defendants alleging them to be co-partners doing business under the firm name of H. F. Co., in assumpsit, and sued out an attachment; two of the defendants claiming to be the members of the partnership, as principals, and L. and G. as sureties, executed a bond for the release of property seized under the attachment, stipulating to pay the judgment that plaintiff should recover against "said defendants;" B. amended his complaint by striking out, as defendants, the names of the three erroneously sued as members of the co-partnership, and obtained judgment against the remaining two defendants as co-partners under the name of H. F. Co.; took out execution which was partially satisfied, and then sued the principals and sureties on the performance bond, when L. paid the balance due on the judgment, and brought this suit against his co-surety for contribution: Held, the amendment of the complaint in the original action introduced no new cause of action, did not increase the liability of the sureties, and did not release them from liability on the bond.

SAME—*contribution—parties.*

Where a surety pays the principal obligation, and sues his co-surety for contribution, his principal is not a necessary or proper party to the action.

OPINION OF THE COURT BY QUARLES, J.

January 14, 1913, J. J. Byrne, assignee of C. Q. Yee Hop & Co., commenced an action of assumpsit against Lee Chan, Young Chan, Lee Look, Lee Nan and L. C. Akana, alleging them to be co-partners doing business under the firm name and style of Hang Fong Company, and sued out a writ of attachment which was, on said day, levied upon certain chattels belong-

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ing to the partnership. January 15, 1913, the defendants, Lee Chan and Young Chan, doing business as co-partners under the name and style of Hang Fong Company, as principals, and Wong Tin Look, plaintiff here, and Goo Wan Hoy, defendant here, as sureties, to obtain the release of said attachment upon said chattels, executed a bond in words and figures as follows:

"This Bond given by Young Chan and Lee Chan, partners, doing business in Honolulu, City and County of Honolulu, Territory of Hawaii, under the name of Hang Fong Company, as principals, Goo Wan Hoy and Wong Tin Look as sureties, to J. J. Byrne, of the said Territory of Hawaii, Witnesseth:

"Whereas, in a suit, No. 7692, in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, brought by J. J. Byrne, Plaintiff, against said principals and others, Defendants, a Writ of Attachment was issued, and

"Whereas, William Henry, High Sheriff of said Territory of Hawaii, has levied upon the goods, chattels and property of said Hang Fong Company and Young Chan under the said Writ of Attachment, and

"Whereas, said defendants, Hang Fong Company and Young Chan, desire to secure the discharge of said writ and the release of said goods, chattels and property from said levy, and said High Sheriff has agreed to release the same, upon the giving of this bond.

"Now, Therefore, said principals and sureties are hereby held and stand firmly bound under said J. J. Byrne, and their assigns, in the sum of Fourteen Hundred Dollars, the payment of which to said J. J. Byrne, and their assigns, said principals and sureties do hereby jointly and severally bind themselves and their respective heirs, executors and administrators.

"The Condition of this Bond is such that in case, said defendants in said suit shall perform the judgment of the court therein, this bond shall be void, otherwise to remain in full force and virtue.

"In Witness Whereof, said principals and sureties have hereunto set their hands and seals this 15th day of January, A. D. 1913.

(Sig.)

"HANG FONG CO.,

"By LEE CHAN.

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"Approved
(Sig.)

"WM. HENRY,
"High Sheriff."

(Sig.) "GOO WAN HOY,
"WONG TIN LOOK."

The defendants filed their joint answer, which was a general denial. Thereafter the plaintiff amended his complaint and voluntarily discontinued the action as to Lee Look, Lee Nan and L. C. Akana. The action was tried, and a judgment entered in favor of the plaintiff and against the defendants Lee Chan and Young Chan, co-partners doing business under the firm name and style of "Hang Fong Company," for the sum of \$1,085.15, including costs. Upon said judgment an execution issued, certain chattels were sold, and the execution returned satisfied to the extent of \$120.05, and unsatisfied as to the balance of \$965.10. Thereafter, and on the 17th day of October, 1913, said plaintiff, Byrne, commenced an action upon the said bond against the principals and the two sureties who executed it; the principals answered and the sureties filed their joint demurrer to the said complaint upon the ground that it appeared upon the face of the said complaint that the judgment in the original action was against only two of the defendants sued as co-partners, by reason of which the sureties were released from all liability upon the said bond. Thereafter, and before trial of the last mentioned action, the surety, Wong Tin Look (the plaintiff here), paid the balance of said judgment, and the said action was thereupon discontinued. The plaintiff thereafter commenced this action against his co-surety to recover one-half of the amount paid upon said judgment, to secure which, said bond was given. To the complaint in this action the defendant answered, his answer being a general denial, the action was tried, and judgment rendered in favor of the defendant, the court deciding in his favor on the idea that the voluntary discontinuance of the original action against the three defendants mistakenly sued as members of the co-partnership

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of Hang Fong Company, increased the liability of the sureties on the performance bond whereby they were released from liability on the bond.

Where one co-surety voluntarily pays the debt of his principal, to be entitled to contribution from his co-surety he must be prepared to show that the obligation was a legal and binding one. In case of a bond whereby the sureties undertake to pay, in a pending action, the judgment that may be rendered against the principal, a judgment against the principal fixes their liability, and they cannot go behind the judgment (*Wm. W. Bierce, Ltd., v. Waterhouse*, 219 U. S. 320; *Robinson v. Kaee*, ante, 403). But, where two sureties undertake that their principal shall perform the judgment of the court in a certain action, and a money judgment is rendered against the principal therein, one surety makes a *prima facie* case against his co-surety for contribution by showing that such judgment was rendered, that the principal did not perform it, and that he has performed it, and the burden is then upon the non-performing co-surety to show a defense, if any there be, to the action against him for contribution. In the case at bar the defendant relied, as a defense, solely upon the dismissal of the three defendants who were not members of the partnership of Hang Fong Company, at the request of the plaintiff in the original action. If the exceptions here are overruled (one is to the admission of certain evidence, one to the decision of the trial court, and the other to the judgment, the latter two on the ground that the decision and judgment are contrary to law and the evidence), it must be upon the ground that the amendment of the complaint in the original action by striking out thereof the names of Lee Look, Lee Nan and L. C. Akana as defendants, changed the obligation of the sureties, and released them from liability. It is unnecessary to discuss the first exception, and the last two raise only the one question.

We hold that the amendment of the complaint in the original

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action by striking out the names of three persons sued as defendants under the mistake that they were members of the co-partnership debtor, under the facts in this case, did not release the sureties on the performance bond from liability. The amendment introduced no new party, nor cause of action. A reading of the bond shows that it was recited therein that Lee Chan and Young Chan, co-partners doing business under the firm name of Hang Fong Company, are principals. The defendant then, when he signed the bond, knew the facts; knew that the co-partnership of Hang Fong Company was sued; knew that the members of that firm were Lee Chan and Young Chan; knew that the said principals desired to obtain a release of their attached property, and to enable them to do so, signed the performance bond herein set out in full. The sureties on that bond are considered, in law, as having executed it with full knowledge of the right of the plaintiff to have the original action dismissed as to the three defendants erroneously alleged to be members of the partnership, and as having contracted with a view of having such right exercised. The law, section 2371, R. L. 1915, expressly authorizes the amendment made. Suing persons who are not bound, with others who are bound, on an obligation does not defeat the right of recovery against those who are bound, and the dismissal of an action against one not bound does not preclude a recovery against defendants who are bound. *Smithies v. Colburn*, 20 Haw. 138; *Kalaniana'ole v. Smithies*, 226 U. S. 462. In the latter case the United States supreme court said: "The joinder of the executor was simply a mistake that did no harm. See *Bierce v. Hutchins*, 205 U. S. 340, 347." In the original action the plaintiff and defendant here were, as sureties, represented by their principals, and are bound by the judgment against their principals. The object of giving the bond, that is, the release of the property attached, was accomplished to the detriment of the plaintiff in the original action. No fraud or imposition was practiced upon the sureties.

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The defense here is purely a technical one. In executing the bond in question the defendant knew who the proper parties defendant to the action were, and who were not proper defendants, and is charged with knowledge that the action would be dismissed as to those improperly joined. He was liable on the bond to the obligee therein named. His co-surety, likewise bound, was rightfully entitled to discharge the whole obligation, when sued, and was not bound to litigate the same, and had the right to contribution from the defendant, who should not be permitted to escape that liability on the technical mistake made in the complaint in the original case, especially when the recitals in his bond show that he knew the facts and was not misled by any statement in that pleading. These views are sustained by the following authorities: *Robinson v. Kaae*, ante 403; *Wm. W. Bierce, Ltd., v. Waterhouse*, 219 U. S. 320; *Heynemann v. Eder*, 17 Cal. 433; *Hood v. Mathis*, 21 Mo. 308; *Ball v. Claflin*, 5 Pick 304; *Lord v. Clark*, 14 Pick. 223; *Smith v. Brown*, 14 N. H. 67; *Sharpe v. Morgan*, 144 Ill. 390; *Salomon v. Buehler*, 129 Ill. App. 178; *Poole v. Dyer*, 123 Mass. 363; *Newell v. Norton*, 3 Wall. 257; *Waldrop v. Wolff*, 114 Ga. 610, 40 S. E. 830; *Gilmore v. Crowell*, 67 Barb. 62.

Considering the object and design of the statute permitting the defendant whose property is attached to have the attachment released upon giving, with sureties, a performance bond, to pay the judgment that may be rendered in the action, the intent of the statute, and the intent of the obligors in giving the bond, the undertaking of the sureties fairly covers any judgment that may be rendered against any of the defendants in the action upon the cause of action therein sued upon, notwithstanding that by amendment the names of some defendants have been stricken. We regard the cases of *Gilmore v. Crowell*, supra; *Salomon v. Buehler*, supra, and *Poole v. Dyer*, supra, as practically on all fours with the case at bar. We therefore hold that the amendment of the complaint by striking out the names

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of the three persons erroneously sued as members of the debtor partnership did not release the sureties on the bond. The bond was given in lieu of the security of the attached property, and the plaintiff creditor was entitled to look to it as security for his judgment, afterwards obtained, on the cause of action sued on.

The trial court was of the opinion that all of the parties to the bond should have been made parties to this action. We do not think so. Section 2374, R. L. 1915, provides that in suits upon promissory notes, agreements and other instruments therein named, all joint obligors shall be joined "*in suing for nonpayment, nonacceptance, or nonfulfilment thereof.*" This action was not upon the bond, but upon the obligation of the defendant to reimburse the plaintiff, *pro tanto*, by way of contribution, resting upon the old equitable rule, since crystalized into law, which makes a nonpaying surety liable to his paying co-surety for a proportionate part, hence the statute cited does not apply. The plaintiff could not join his principals with his co-surety, as defendants, in this action for contribution. 32 Cyc. 299; 16 Enc. Pl. & Pr. 961. We think the exceptions should be sustained.

As this cause depends upon a question of law, herein decided in favor of the plaintiff and against the defendant, and nothing remains except to enter a proper judgment, the cause is remanded to the circuit court with instructions to enter judgment in favor of the plaintiff and against the defendant for one-half of the amount shown to have been paid by the plaintiff upon the judgment in the original attachment action, with costs. Costs of appeal awarded to the plaintiff.

Exceptions sustained.

W. B. Lymer for plaintiff.

J. Lightfoot for defendant.

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CONCURRING OPINION OF CIRCUIT JUDGE ASHFORD.

There are but two questions presented for decision in this case, they being (1) Whether there was a defect of parties, for the non-inclusion of certain of the signatory parties to the bond given for the release of the attached property; and (2) Whether the sureties upon that bond were released by the voluntary discontinuance of the action, without the consent of the sureties, as to three of the five original defendants,—the action having proceeded to judgment against two only of those defendants. A subsidiary question, which is really involved in the last above stated, is whether the trial court erred in permitting the defendant to testify, over objection, that he relied, in becoming a surety, upon the financial responsibility of two of the defendants against whom the suit was discontinued.

I concur fully in the view stated in the majority opinion that there was no defect of parties, and for the reasons therein given.

As to the second question, there is a great diversity of opinion among American courts, with abundance of authority to sustain a decision either way. And if the question were here squarely presented to the court, and necessary to be decided, I incline to the opinion that my vote would be cast in favor of the exoneration of the sureties, because of the voluntary discontinuance of the action, by the plaintiff, as against certain of the defendants, upon whose financial standing, as above, defendant claims to have relied at the time of the signing of the bond. In a case such as would then be presented, it would be competent and necessary for this court to make a choice between the conflicting authorities. But, as I view the matter, the necessity of so choosing has been obviated by the text of the performance bond signed by the sureties. In and by that bond, the defendants, Young Chan and Lee Chan (against whom the judgment was rendered), are described as "partners doing business * * * under the name of Hang Fong Company." The other three

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defendants are not named in the bond, and are not parties thereto. I regard the language above quoted as being the equivalent of a recital that the defendants Young Chan and Lee Chan were then the only partners in, and members of, the firm of Hang Fong Company. Such a recital, so voluntarily made and signed by the sureties, should estop them, in the view which I take of the matter, from now claiming that in signing the bond, they relied upon the financial responsibility of the other three defendants as against whom the suit was discontinued, or any of them. The same bond also describes the property seized, and the release of which the bond was given to effect, as being the property of the partnership; and the final judgment passed against the partnership, and the two individuals of which it was composed. This view also disposes of the subsidiary question above suggested. The admission of evidence in derogation of the recitals of the bond, should, I think, have been refused by the trial court. But although the evidence so tendered was received by the trial court, yet it is fair to that court to state that, in its written decision, a statement appears that the court does not rely upon that evidence in determining the case. It might well be suggested that, if the evidence referred to was not relied upon, there was not enough left to support the decision. See *Andre v. Fitzhugh*, 18 Mich. 93.

I do not, however, regard the decision in *Bierce v. Waterhouse*, 219 U. S. 320, 55 Law Ed. 237, as being either decisive of this case, or as having decided any point which is here involved. The point, in respect to which my associates appear to rely upon that case, is, that an amendment of an original pleading, if it states no new cause of action, does not release the sureties upon a replevin or attachment bond given in the cause. But an attentive reading of the opinion persuades me that the federal supreme court did not so undertake to, and did not in fact, so decide in that case. It merely emphasized the fact that the point, as there made, was already *res judicata*, as having

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been decided against the surety upon the replevin bond there involved, in an earlier action wherein said surety had been represented by his principal, namely, in *Bierce v. Hutchins*, 18 Haw. 511.

While I concur in the judgment, I feel that the decision should be restricted to the two points herein discussed, namely, the alleged defect of parties, and the estoppel of the defendant to deny the legal and reasonable effect of the recitals in the bond signed by him. Those recitals make it manifest that the defendant did not, in fact, rely upon the financial responsibility of any of the defendants in the attachment suit other than the two against whom the judgment was rendered, and that he suffered no prejudice from the discontinuance of that action as to the remaining three defendants.

Believing that it is unnecessary, in this case, to decide the point, I feel that this court should not now undertake to decide, whether or not the discontinuance of an action as to one or more defendants, done without the consent of the sureties upon an attachment bond given in such action, should be held to operate as a release and exoneration of such sureties, in any event, and without regard to questions of estoppel which, in my judgment, are decisive of the present case.

Consolidated Amusement Co. v. Hughes, 22 Haw. 550

CONSOLIDATED AMUSEMENT COMPANY, LIMITED,
AN HAWAIIAN CORPORATION, v. W. R. HUGHES,
VARIETY FILM EXCHANGE COMPANY, A
FOREIGN CORPORATION, AND HENRY BRED-
HOFF.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED MAY 12, 1915.

DECIDED MAY 17, 1915.

ROBERTSON, C. J., WATSON AND QUARLES, JJ.

INJUNCTION—*right to must be clear.*

Temporary injunctions do not issue as a matter of right except in cases where the right to such relief is clear and beyond doubt.

SAME—*pleading.*

The probative facts—not conclusions—showing the right to a temporary injunction must be stated in the bill for injunction, else it will be denied.

SAME—*statute relating to contracts for personal service.*

Section 10, of the Organic Act creating the Territory of Hawaii, which prohibits suits upon contracts for personal service, except actions for damages for breaches thereof, does not prohibit injunctions to restrain the exhibition or dealing in motion picture films in violation of a contract not to exhibit or deal in such films.

APPEAL AND ERROR—*wrong reason for correct judgment.*

It is a well established rule that a judgment, order or decree will be affirmed on appeal if the record shows it to be correct, although the trial court may have given a wrong reason for making it.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff filed its bill in equity in the circuit court of the first judicial circuit seeking to enjoin the defendants Hughes, the Variety Film Exchange Company, and Henry Bredhoff from exhibiting a motion picture film, known as Three Weeks, at the Popular Theatre in Honolulu, or elsewhere in the Territory of Hawaii, and from leasing or renting

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the said film for exhibition in any place in the Territory of Hawaii. In its bill the plaintiff alleges that it is the owner of the three principal theatres in Honolulu and does an extensive film business throughout the Territory of Hawaii; that on January 14, 1915, the plaintiff and the defendant Hughes entered into a contract, which is attached to and made a part of the bill, wherein said Hughes agreed to do certain things not in question here. The fifth paragraph of the bill is in words and figures as follows: "That said Hughes has violated the terms of said contract by, without the consent in writing or any consent of plaintiff, associating himself with the Popular Theatre situated on the makai side of Hotel Street, between Bishop and Alakea Streets, in Honolulu, which is owned by the Variety Film Exchange Company, under the management and control of Henry Bredhoff. That said Hughes has procured from San Francisco and has now in Honolulu a feature motion picture film known as 'Three Weeks' and has arranged with said Variety Film Exchange Company to show and exhibit the same in said Popular Theatre for a season beginning Friday, May 7, 1915, and said Hughes also proposes to rent out said film in the Territory of Hawaii in competition with the film business of plaintiff. That the proposed action of said Hughes is in direct violation of his contract with plaintiff, and more particularly to that portion of said contract reading as follows: '(15) That said second party hereby agrees that he will not directly or indirectly during the period of three years from this date, in the Territory of Hawaii, engage in any theatrical enterprise of whatsoever nature, or in the giving of any motion picture shows, or in the dealing in motion picture films, without the consent in writing of said first party.'" The plaintiff alleged the insolvency of the defendant Hughes; that the exhibition of said motion picture film by defendants would damage it irreparably, such damages not being susceptible of estimation; that it had not agreed in writing or otherwise that said Hughes should exhibit said film. An order to show cause why a tem-

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porary injunction should not issue against the defendants was made, whereupon the defendants appeared and the defendant Hughes filed his separate plea to the jurisdiction of the court on the ground that the contract set forth by the bill is one involving personal service, and by the provisions of section 10 of the Organic Act creating the Territory of Hawaii no remedy other than an action for damages will lie thereon. The defendants Variety Film Exchange Company and Henry Bredhoff filed their joint plea to the jurisdiction of the court upon the several grounds: (1) That the said contract is one for personal service; (2) that these defendants are not parties to the said contract; (3) that the bill does not show that these defendants are privies to the said contract; (4) that the bill fails to state a subject-matter as to these defendants over which the court has jurisdiction; (5) and that the bill fails to state a cause of action as to these defendants.

The circuit judge made no formal order either sustaining or overruling the said pleas, but dismissed the bill as to the defendants the Variety Film Exchange Company and Henry Bredhoff, which may be treated as sustaining, in effect, their plea, but retained the bill as to defendant Hughes, which may be treated as overruling, in effect, his plea. The circuit judge refused to grant a temporary injunction against the defendant Hughes and allowed an interlocutory appeal to this court.

The plaintiff insists that it was entitled to a temporary injunction as against all of the said defendants; against the defendant Hughes by reason of the stipulations in his contract, and against the other two defendants on the ground that they are associated with defendant Hughes in the violation of his contract. The principal authority cited by plaintiff to sustain this contention is that of *Grow v. Seligman*, 47 Mich. 607. A careful reading of this decision shows that the defendant therein, Jacob Seligman, built up and established at Bay City a business in clothing, hats, caps and furnishing goods under the name of "Little Jake;" that he sold same to plaintiffs, representing that

the name "Little Jake" was a trade-mark which was copyrighted by him, and in the contract of sale agreed that he would not sell, give or transfer the right to use said name to others; that he would not use it himself; and that he would not engage in the same kind of business at Bay City. After the plaintiffs had conducted the business, so purchased by them from Jacob Seligman, for a period of about three years, doing a prosperous business, the said Jacob Seligman, Joseph Seligman and Frank Rossman procured a stock of clothing, hats, caps and furnishing goods and prepared to and were about to open a similar business in Bay City, advertising to open at a certain time under the name of "Little Jake, Rossman & Co." The plaintiffs procured a temporary injunction, which was made perpetual, restraining Jacob Seligman, Joseph Seligman and Frank Rossman from doing such business at Bay City under the name of "Little Jake," and restraining Jacob Seligman from doing such business at Bay City under any name, individually or as a member of any firm or co-partnership. On appeal the decree of the trial court was affirmed. In the opinion the court, at page 611, said: "It is also urged on the part of the defendants that the decree is too broad in restraining the defendants Joseph Seligman and Frank Rossman, who were not parties to the contract with complainants, from carrying on their business in any way or mode which would have been open to them if no such contract had been in existence. But under the facts shown by the bill and admitted by the answer it is plain that the use of the name 'Little Jake' in the business of these two defendants at Bay City, would be calculated to lead the public to suppose that the defendant Jacob Seligman was associated in the business with them. If he is associated with them in fact, it is a violation of his agreement and a wrong to the complainants in which all the defendants unite; if not associated with them, the use of the name is calculated to mislead the public to the prejudice of complainants. That the purpose of making use of the name in their new business at Bay City was to deprive complainants

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of the advantages for which they had paid when they purchased Jacob Seligman's business, is charged by the bill and admitted by the answer; and that was a distinct wrong in which all of the defendants united. It was a wrong whereby they expected to appropriate the good-will of a business which belonged to complainants; and the decree is no broader than is essential to preclude its consummation."

It will be noted that the court in that case did not restrain Joseph Seligman and Frank Rossman, the two defendants who were not parties to the contract in question there, from doing a similar business, but only restrained them from using a trade-name. No such question arises here. No question of using a trade-mark or established trade-name or of appropriating the good-will of an established business is involved here. The Variety Film Exchange Company, and its manager, Bredhoff, are not parties to the contract, the violation of which is sought to be enjoined. There is no allegation in the bill that the defendants, other than Hughes, knew of the existence of such contract. A party to a contract will not be enjoined from breaking it when such action would compel him to break a contract with an innocent third person to the injury of the latter (22 Cyc. 854). Temporary injunctions do not issue as a matter of right except in cases where the right to such relief is clear and beyond doubt. Unless the right to a temporary injunction is clear the same rests in the discretion of the trial court or chancellor, but any abuse of such discretion, either in granting or refusing, will be ground for reversal on appeal (22 Cyc. 746-749). It is not sufficient to state conclusions. The probative facts must be stated in the bill for an injunction or it will be denied (10 Ency. Pl. & Pr., 925, 926, and authorities cited in note 1, p. 926). "To authorize a temporary injunction the complainant must make out at least a *prima facie* showing of a right to the final relief" (22 Cyc. 754, 755; *Young Chun v. Robinson*, 21 Haw. 70, 73). The rule as to enjoining violations of a contract is stated in 22 Cyc. 866, as follows: "Before the court will en-

join a breach there must be no doubt about the validity of the contract, and its terms must be clearly proved and the fact of breach established beyond doubt." The case at bar does not allege that the defendant Hughes and the Variety Film Exchange Company are acting as partners, or that the latter is acting as agent; nor are the facts alleged showing how or in what manner they are associated together. The bill does not allege facts which show that the defendant Hughes "arranged" with the defendant Variety Film Exchange Company to exhibit the said film. Every allegation in the bill may be true and yet the Variety Film Exchange Company may, without any knowledge of the contract between plaintiff and Hughes, have procured the film from Hughes, and may be exhibiting it without the latter participating in the exhibition at all or being financially interested therein; and if that be the case the plaintiff is not entitled to an injunction against the Variety Film Exchange Company restraining it from exhibiting the said film. The allegations of the bill lack that certainty required to authorize a temporary injunction. Hughes may be a partner in the venture of exhibiting the said film, and if that be true, under the rule announced in *Grow v. Seligman*, supra, Hughes might be enjoined from exhibiting the film individually or as a partner of someone else or by another as his agent. It may be that the Variety Film Exchange Company is the agent of Hughes and as such is exhibiting said film. If that be true it could be enjoined from exhibiting the film as such agent. But there are no allegations of such facts in the bill. The pleader might well have alleged that Hughes "arranged" with the Variety Film Exchange Company for the latter to exhibit the said film, when the arrangement consisted of a sale or leasing of the film, and the said Hughes have no financial interest whatever in its exhibition and nothing to do therewith. The allegation in the bill that Hughes "proposes to rent out said film in the Territory of Hawaii in competition with the film business of the plaintiff," does not sufficiently show an impending violation of the contract

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between him and the plaintiff. "The bill must allege, especially where a preliminary injunction is sought, that injurious acts are about to be done, and not merely that they have been already accomplished, and it must be shown that there is imminent and actually impending danger of the plaintiff's rights being violated" (10 Ency. Pl. & Pr. 947, 948). "The threatened injury must, however, be clearly impending, and it is generally not sufficient to show mere threats to do the thing sought to be enjoined. Some overt act toward carrying out the threat must usually be shown" (22 Cyc. 757, 758). It would be proper for the circuit judge to allow the plaintiff to amend its complaint as to actually impending future violations of its contract with Hughes, by him, if it should be so advised. We are clearly of the opinion that the denial of the temporary injunction was correct as to all three of the defendants.

The reason assigned by the circuit judge for refusing a temporary injunction was expressed by him as follows: "I think the Organic Act, as well as the common law, covers the proposition that the plaintiff is not entitled to this remedy by injunction." The circuit judge having retained the bill as to the defendant Hughes, evidently intending to give the parties a final hearing as to the matter of a perpetual injunction against the defendant Hughes, we deem it proper to express our views as to the application of the provisions of section 10 of the Organic Act relating to the specific performance of contracts for personal service to this case. The contract alleged is not a contract for personal service in so far as it relates to the exhibition or dealing in motion picture films, and only to that extent is the contract in question here. It does contain a stipulation wherein the defendant Hughes agreed not to exhibit or deal in motion picture films in the Territory of Hawaii, and to that extent the contract is not one of the class of contracts which section 10 of the Organic Act provides shall not be enforced, but for a violation of which the parties must be relegated to an action for

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damages. Hence that section has no application to the matters involved in this suit.

The plaintiff contends that the circuit judge having relied on the Organic Act for authority for refusing the temporary injunction, that the order denying such injunction must be reversed. We do not take that view. It is a well established rule that a judgment, order or decree will be affirmed on appeal if the record shows it to be correct, although the trial court may have given a wrong reason for making it.

The decree appealed from is affirmed without prejudice to the right of the plaintiff to apply for leave to amend its bill, if it should be so advised, with costs to the defendants.

J. A. Magoon for plaintiff.

C. H. McBride for defendants.

IN THE MATTER OF THE APPLICATION OF CLARENCE D. PRINGLE FOR A WRIT OF MANDAMUS AGAINST JAMES BICKNELL, AUDITOR OF THE CITY AND COUNTY OF HONOLULU, TERRITORY OF HAWAII.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.
HON. C. W. ASHFORD, JUDGE.

ARGUED MARCH 27, 1915.

DECIDED MARCH 29, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CLERKS OF COURTS—tenure of office.

A clerk of the circuit court holds his office during the pleasure of the appointing power.

SAME—appointment and removal—Sec. 2314 R. L. 1915 construed.

Under section 2314 R. L. 1915, which provides that there shall be as many clerks of the circuit courts as may be necessary, appointed and removable by the judge or judges thereof, as the case

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may be, held, that in a circuit where there are more judges than one, the appointment or removal of a clerk requires the presence, actual or constructive, of all the judges and the concurrent action of a majority.

SAME—*right of de facto officer to compensation.*

The salary of an office follows the title and when an individual claims by action the office, or the incidents to the office, he can only recover upon proof of title.

SAME—*same—title to the office in issue.*

An officer seeking to compel payment of compensation by mandamus must show that he is an officer *de jure* and not merely an officer *de facto*. In such a proceeding his title to the office may be put in issue.

OPINION OF THE COURT BY WATSON, J.

(Quarles, J., dissenting.)

In a petition for a writ of mandamus before a circuit judge of the first judicial circuit it was alleged that petitioner was appointed clerk of the third division of the circuit court of the first judicial circuit by the Honorable Thomas B. Stuart, third judge of said court, on December 7, 1914; that petitioner duly qualified as such clerk and since said last mentioned date has held said office and is entitled to receive the income, profits and emoluments thereof and particularly a salary at the rate of \$125 per month from said December 7; that James Bicknell is the duly elected and acting auditor of the city and county of Honolulu, Territory of Hawaii, whose duty it is as such auditor to issue to petitioner warrants upon the treasurer of the city and county of Honolulu for the payment of such salary; that said Bicknell has refused to issue to petitioner warrants upon the city and county treasurer for the payment of his salary. The prayer is for an alternative writ of mandamus directed to said auditor commanding him to issue the warrants or to appear and show cause why he should not do so. An alternative writ issued, to which respondent made return alleging that on the first day of July, 1911, the three judges of said first circuit court duly constituted, appointed and commissioned one V. M. Harrison

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a clerk of the circuit court of said first judicial circuit under and by virtue of the provisions of Act 84 S. L. 1911, and the said Harrison was thereupon assigned for duty as clerk of the said circuit court in the division presided over by the third judge thereof (at that time the Honorable W. J. Robinson), and thereafter the said Harrison performed his duties as such clerk, under such assignment, until the seventh day of December, 1914, without any hindrance or interruption whatsoever; that on the seventh day of December, 1914, the Honorable Thomas B. Stuart, the duly appointed, qualified and acting successor in office to said W. J. Robinson, third judge of said circuit court of the first judicial circuit of the Territory of Hawaii, acting alone and without the concurrence or acquiescence, as respondent is informed and believes and upon information and belief alleges the fact to be, of the first and second judges of the said circuit court of the first judicial circuit of the Territory of Hawaii, or either of them, attempted to discharge and remove the said V. M. Harrison as clerk of said court, and on said seventh day of December, 1914, likewise acting alone and without the concurrence or acquiescence of the said first and second judges of said court, or either of them, attempted to appoint the petitioner, Clarence D. Pringle, to the said office of clerk of the circuit court of the first judicial circuit of the Territory of Hawaii, and that the attempted discharge of Harrison and the attempted appointment of Pringle were and are null and void for the reason that the said acts were not performed by the three judges of the first circuit court, or at least by a majority of the three; that Harrison has never resigned his office and has never been discharged therefrom except, as stated, by Judge Stuart, and that he is now and at all times since said attempted and purported discharge and removal has been ready, willing and able to perform the duties of said office, as to all of which the said third judge was fully informed and advised, but that he is and has been since said December 7, 1914, prevented from performing said duties or any of them by the said third judge and

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by petitioner; that by reason of the foregoing facts petitioner is not entitled to the relief asked, and respondent in his said return prays that the alternative writ and the proceedings had be dismissed. To the return and answer so filed by respondent petitioner interposed a demurrer, the grounds of which, as relied on in this court, being (a) that the answer and return do not show wherein the discharge of Harrison and the appointment of Pringle are null and void; (b) that the answer and return do not show any legal cause why petitioner should not have the relief prayed. The demurrer was joined in and the respondent was permitted to amend his return and answer by attaching thereto a copy of Harrison's commission as follows:

"TO ALL TO WHOM THESE PRESENTS SHALL COME,
GREETING:

BE IT KNOWN, That having full faith and confidence in the honesty, integrity and ability of

V. M. HARRISON,

and by virtue of the power and authority vested in us by law, we HENRY E. COOPER, First Judge, WM. L. WHITNEY, Second Judge, and W. J. ROBINSON, Third Judge respectively, of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, by these presents, do constitute, appoint and commission said V. M. HARRISON a Clerk of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, under and by virtue of Act 84 of the Session Laws of 1911, at the salary of \$100 per month, to hold and occupy said office and to receive and enjoy the income, profits and emoluments thereof or connected therewith, with full power and authority to do and perform any and all acts and things and to perform and discharge any and all duties set forth and described in or under the Constitution and laws of the United States and the laws of the Territory of Hawaii which are now in force or which may hereafter be enacted relating or appertaining to or concerning such office or the incumbent thereof.

IN WITNESS WHEREOF, we have hereunto set our hands
and the seal of the Circuit Court of the First Judi-

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(SEAL) cial Circuit of the Territory of Hawaii, at Honolulu,
Territory of Hawaii, this 1st day of July, A. D.
1911.

“HENRY E. COOPER,
First Judge,

“WM. L. WHITNEY,
Second Judge,

“W. J. ROBINSON,
Third Judge.”

The honorable circuit judge thereupon reserved to this court the question “whether or not this circuit court should, as the pleadings now stand, sustain the demurrer interposed by the petitioner to the return and answer heretofore filed by the respondent.”

In answering the reserved question it becomes necessary to inquire what powers in relation to the appointment of clerks are delegated to the circuit judges, and more particularly to the judges of the circuit court of the first judicial circuit, by the laws of this Territory, with a view of determining whether a judge of the first circuit court, acting alone, has power to appoint and remove the clerk or clerks who are to serve in the particular division of the court presided over by him, or whether such power is vested by law in all of the judges of that court as a body, to be exercised by them collectively. The statutes of Hawaii nowhere designate the term for which a clerk of the circuit court shall be appointed, and it is conceded by both counsel for petitioner and respondent that the tenure of office not being fixed by law the power of removal is incident to the power of appointment, and the term of office will continue during the pleasure of the appointing power. This is in accord with the general rule. *Field v. Girard College Directors*, 54 Pa. 233; *Mechem on Public Officers*, §445.

The statute under which the clerks of the circuit courts are appointed is section 1680 R. L. 1905, as amended by Act 54 S. L. 1907, as, further amended by Act 84 S. L. 1911. This

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section, as so amended, is section 2314 R. L. 1915, included in chapter 134 under the title "Clerks, stenographers and interpreters." This section reads:

"Section 2314. There shall be a clerk of the supreme court and as many deputy clerks and assistant clerks as the business of the supreme court shall require, appointed and removable by the justices of the supreme court. The clerk of the supreme court shall be ex-officio clerk of all the courts of record of the Territory, and as such may issue process returnable in all such courts.

"There shall be as many clerks of the circuit courts as may be necessary, appointed and removable by the judge or judges thereof, as the case may be."

Prior to the amendment of 1911, section 1680, as amended by Act 54 S. L. 1907, made provision for the appointment of court clerks as follows:

"Section 1680. There shall be a clerk of the judiciary department and as many deputy clerks and assistant clerks as the business of the department shall require, whose salaries shall be fixed by the legislature. The clerk of the judiciary department shall be appointed by the justices of the supreme court, and shall be ex-officio clerk of all the courts of record of the Territory, and as such may issue process returnable in all such courts. He shall have supervision and direction of the deputy and assistant clerks, but shall not be held responsible for their acts or omissions. He shall have charge of the records, moneys and business in the central office in Honolulu and shall supervise and direct the mode of keeping accounts and records.

"There shall be two or more deputy clerks of the first circuit who shall be clerks of the supreme court and of the circuit court of the first circuit. Of these, two may be appointed and removed by the chief justice of the supreme court, and one by each of the circuit judges of the first circuit.

"There shall also be one deputy clerk for each of the other circuit courts appointed and removable by the judge thereof.

"There may also be one assistant clerk appointed and removable by each circuit judge with like power and duties of the deputy clerks, and each assistant clerk so appointed by a circuit judge shall be ex-officio bailiff for the court of the circuit judge by whom he shall be appointed.

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"Any deputy clerk or assistant clerk may be removed by the supreme court for inefficiency or misconduct."

From a reading of the law as it stood prior to the amendment of 1911 it will be seen that two of the clerks of the first circuit (or deputy clerks as they were called at that time) were also to act as clerks of the supreme court, these two to be appointed and removed by the chief justice of the supreme court; also that specific provision was made for the appointment by *each* of the judges of the first circuit court of one clerk and an assistant clerk, the latter of whom should be "ex officio bailiff for the court of the circuit judge by whom he shall be appointed." In the law of 1911, which is now in force, and which amended the act of 1907, the word *each* is nowhere used, but in the place thereof it is enacted that "There shall be as many clerks of the circuit courts as may be necessary, appointed and removable by the judge or judges thereof, as the case may be." Under this provision it is contended by counsel for petitioner that in a circuit where there are more judges than one each of such judges may appoint and remove *his* clerk, that is, the clerk who is to serve in the particular division of the court presided over by him, and in support of that contention counsel relies most strongly, if not exclusively, upon the report of the judiciary committee of the house, of representatives upon house bill No. 74 of the legislative session of 1911, which bill afterwards became law as Act 84, S. L. 1911. In that report, which appears on page 262 of the house journal, session of 1911, the following language is used:

"This bill was drawn primarily in view of the reconstruction of the present judiciary building, for in that building provision will be made for each court being able to care for its own records. But it is a matter which has been favorably considered by the judges affected for some time. Under the proposed bill each judge will have power to appoint or remove his own clerk. Each clerk shall have charge of all the records pertaining to his respective court."

On page 380 of the senate journal for 1911 appears the re-

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port of the judiciary committee of the senate on house bill No. 74, which reads in part as follows:

"This bill is in line with the policy of separating the clerks of the supreme court from the clerks of the circuit courts, is in accord with the ideas of the administration and is considered by this committee as a desirable measure."

There is nothing in the report of the senate committee, which was adopted, to indicate that the senate, when it acted on house bill No. 74, had any intention of providing in the bill that each judge of the circuit court should appoint his own clerk. The only fact that concurrently appears from a reading of the two reports is that the measure was enacted for the purpose of separating the clerks of the supreme court from the clerks of the circuit courts and enabling each of such courts, that is, the supreme court and the circuit court, to appoint its own clerks. This purpose was clearly effected, and as to this there is no question. We are unable to adopt the construction sought to be placed by counsel for petitioner on the statutory provision, as to do so would be to ignore and fail to give effect to the words "by the judge or judges thereof, as the case may be." It is a cardinal rule of statutory construction that the courts are bound, if possible, to give effect to all of its parts, and no sentence, clause or word shall be construed as unmeaning or surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute. *Lyman v. Maguire*, 17 Haw. 142, 145; *Attorney General v. Road Co.*, 2 Mich. 138; *State v. Fontenot*, 36 So. 630; *Hagenbuck v. Reed*, 3 Neb. 17; Opinion of the Justices, 39 Mass. 571. The use of the words in the alternative "by the judge or judges thereof, as the case may be," is obviously made necessary by the fact that in the circuit court of the first judicial circuit there are three judges, while in each of the other circuits there is but one judge. As we view it, the amendment of 1911 is substantially a provision that the clerks of the various circuit courts shall be appointed and removable by the judge or

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judges of such courts respectively. It takes away from the chief justice of the supreme court the right to appoint any of the clerks of the first circuit court, segregates the duties of such clerks from those of the clerks of the supreme court, and, as applicable to the circuit court of the first judicial circuit, confers upon the judges of that court the power to appoint and remove as many clerks as may be necessary.

In our opinion the language of the statute is clear that in a circuit where there are more judges than one the clerks shall be appointed and removable by the judges of the court, acting jointly. This view results also from a consideration of the legislation beginning with the judiciary act of 1892. Our view, that under the amendment of 1911 the clerks of the first circuit court are to be appointed by the judges of that court, acting jointly, is evidently in accord with the construction placed upon the statutory provision by the judges of the first circuit court who were in office on July 1, 1911, the date that the amendatory act went into effect. This is evidenced by the fact that the commission issued to Mr. Harrison as a clerk of the first circuit court, dated July 1, 1911, and hereinabove set out in *haec verba*, was signed by the first, second and third judges of said court. While this contemporaneous construction which the law received soon after its enactment is not controlling, it is entitled to and should receive weight. 2 Lewis' *Suth. Stat. Const.*, §472.

Assuming that this court may in a case where the language of a statute is ambiguous and its meaning is doubtful examine the legislative journals to ascertain the intent of the lawmaking body we are of the opinion that there is no such ambiguity in the act of 1911 as to justify or require a reference to the legislative records. The language used in the report of the judiciary committee of the house, "under the proposed bill each judge will have power to appoint or remove his own clerk," is not warranted by anything found in the bill itself, and if the legislature intended this they have signally failed to express such intention in the language used. Certainly the legislative record should

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not be resorted to for the purpose of creating an ambiguity which does not exist upon a bare reading of the statute itself. As was said in the case of *Duncan v. Combs*, 131 Ky. 330, 115 S. W. 222, 224, 225:

"The statute, as enrolled, must be accepted as the law, and, where it is plain and unambiguous in its terms and not uncertain in its meaning, no necessity arises, in construing same, for calling in aid the journals of the respective houses or other extraneous matter. The journals might be used, as might other evidence, in construing an ambiguous statute, but not to give a statute, unambiguous in its terms, a meaning other than that which its language plainly imports." See also *Webber v. Ry. Co.*, 97 Fed. 140; *Water Commissioners v. Brewster*, 42 N. J. L. 125; *Lake County v. Rollins*, 130 U. S. 662, 670.

The vice of the contention advanced by counsel for petitioner, that in a circuit court where there are more judges than one each of such judges may appoint *his* clerk, is demonstrated by the language of the statute, which provides for the appointment of clerks, not of the circuit judges but of the circuit courts. It is provided in clear and unambiguous language that such clerks (that is, the clerks of the circuit courts) shall be "appointed and removable by the judge or judges thereof, as the case may be." As was said in the case of *The People v. Mobley*, 1 Scammon (Ill.) 214, 221, where a constitutional provision relating to the appointment of circuit court clerks was under consideration:

"If * * * the power of appointment should be regarded as personal to the judge it would necessarily attach to every judge immediately upon his appointment, and upon the happening of a vacancy in the office of judge the clerkships * * * would also become vacant; and upon the same principle, when circuit judges should change circuits, as by law they are authorized to do, the office of clerk would become vacant by such exchange * * * because the judge presiding in the circuit court of a county is for the time being the judge of that court; and if the clerk is the officer of the judge, and not of the court or law, he would have to be appointed upon every such exchange, and until

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an appointment was made the administration of justice would be suspended. Such a construction * * * it is believed, is not warranted, and would in its consequences be fraught with great inconvenience to the public."

By Act 68 S. L. 1913 it is provided:

"Section 2. The several counties and city and county shall pay the expenses of their respective circuit courts and the salaries of the following officers of such courts, as required by such courts, to the extent of the following amounts," etc.

Provision is then made for the payment of salaries to eight clerks of the first circuit court, including a chief clerk and an assistant chief clerk. Of these eight clerks, whose salaries are so provided for by statute and directed to be paid by the city and county of Honolulu, the chief clerk and assistant chief clerk are and have been since the passage of the act assigned for duty in the outer or main office of the court, while of the remaining six two are assigned for duty in the respective court rooms of each of the three judges. At the argument counsel for petitioner took the position that under the act of 1911 the two clerks who are assigned for duty in the main office of the court might well be appointed by the three judges, acting conjointly, but then, as now, he contended that the clerks who are assigned for duty in the various court rooms are appointable and removable by the individual judges respectively. We find nothing in the statute which differentiates the manner of the appointment of the clerks employed in the particular court rooms from that of the clerks assigned for duty in the main office. In the well considered case of *State Treasurer's Settlement*, 70 N. W. 532, it is held that where authority is conferred by law upon three or more persons to execute a public trust (in that case the approval of the bonds of state depositories) the act of a majority is binding if all were assembled to deliberate or had notice and opportunity to be present, unless the statute expressly requires the concurrent action of all. See also Mechem on Public Officers, §572; *Merchant v. North*, 10 Ohio St. 252.

Applying the foregoing principles we are clearly of the opin-

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ion that under the provisions of section 2314 R. L. 1915 the appointment or removal of clerks of the first circuit court requires the presence, actual or constructive, of all the judges and the concurrent action of a majority. From what has been said it follows that in our opinion the appointment of petitioner by the third judge of the first circuit court, acting alone, and likewise the removal of Harrison by said third judge, acting alone, were without authority of law and void.

Finally it is contended by petitioner that it is sufficient to enable him to maintain his action for compensation that he was a clerk *de facto* and that his title to the office cannot be questioned by respondent in this proceeding. This very question was presented and, we think, correctly decided in the case of *Dolliver v. Parks*, 136 Mass. 499, 500, where the court said:

"While the acts of an officer *de facto* are valid, so far as they concern the public or the rights of third persons who are interested in the things done, and his title to the office cannot be inquired into collaterally, yet when he sues in his own right, to recover fees which he claims are due him personally, by virtue of his office, his title to the office may be put in issue; and, to recover, he must show that he is an officer *de jure*. In such a suit no rights of the public or of third persons are concerned. The question of title to the office is directly raised; and he can recover no benefit to himself from an office he holds *de facto* only."

In *Stott v. City of Chicago*, 205 Ill. 281, the rule is laid down as follows: "An officer seeking to compel payment of compensation by mandamus must show that he is an officer *de jure* and not merely an officer *de facto*."

Where a statute provides that an officer shall be appointed in a certain way, if such officer is appointed in a way different from that provided by statute, and acts, he cannot recover for his services as an officer *de facto*. *Phelon v. Granville*, 140 Mass. 386, 5 N. E. 269. The salary of an office follows the title. *Macfarlane v. Damon*, 8 Haw. 19, 38; *People v. Tieman*, 30 Barb. (N. Y.) 193, 195. When an individual claims by

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action the office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defense, but cannot, as against the public, be converted into a weapon of attack to secure the fruits of the usurpation and the incidents to the office. *Dorsey v. Smyth*, 28 Cal. 21, 26. The fact that the petitioner, Pringle, was acting in good faith in claiming the office does not give him the right to recover. *Comstock v. Grand Rapids*, 40 Mich. 397.

For the reasons stated the reserved question is answered in the negative.

J. Lightfoot for petitioner.

F. W. Milverton (*Thompson & Milverton* and *J. W. Cathcart*, City and County Attorney, on the brief) for respondent.

DISSENTING OPINION OF QUARLES, J.

The paramount question raised by the demurrer to the return of the respondent involved in the question reserved to this court is, whether the third judge of the first circuit has power to dismiss and appoint clerks to transact the business of the court presided over by him "without the concurrence or acquiescence" of the first and second judges, or either of them, of said court. The law relating to the appointment of clerks of the supreme and circuit courts, as it has existed in this jurisdiction since 1892, is found in section 1680 R. L. 1905, and in Act 54 S. L. 1907, amending the said section, and is stated at length in the majority opinion. The statute was amended by Act 84 S. L. 1911 (now Sec. 2314 R. L. 1915), also set forth in the majority opinion. The solution of this question requires an interpretation or construction of that portion of the last statute which relates to the appointment of circuit court clerks, namely, "There shall be as many clerks of the circuit courts as may be necessary, appointed and removable by the judge or judges thereof, as the case may be." The majority opinion construes this provision as requiring the concurrent action of the three circuit judges in the first circuit in the matter of appointing and re-

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moving clerks acting in the divisions over which the several judges preside. With that construction I am unable to agree, for the reasons which I will now state.

Section 14 R. L. 1915 provides that words in the singular or plural signify both singular and plural, and this provision follows a well recognized rule of statutory construction. "When necessary to give effect to the legislative intent, words in the plural number will be construed to include the singular, and words importing the singular only will be applied to the plural of persons and things" (36 Cyc. 1123). The intent of the legislature must be ascertained and given effect. This intent is gathered from the language of the statute giving to the words used their usual signification. "Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended. For the purpose of determining the meaning, although not the validity, of a statute, recourse may be had to considerations of public policy, and to the established policy of the legislature as disclosed by a general course of legislation. * * * If the purpose and well ascertained object of a statute are inconsistent with the precise words, the latter must yield to the controlling influence of the legislative will resulting from the whole act" (36 Cyc. 1110, 1111). All statutes relating to the same subject should be consulted so as to ascertain and give effect to the legislative will. Looking at the statutes relating to the appointment of clerks for the courts as they existed prior to the amendment of section 1680 R. L. 1905, as amended by Act 54 S. L. 1907, by Act 84 1911, we find that the appointment and removal of clerks was made in part by the justices of the supreme court and in part by the circuit judges, and some of the clerks acting as clerks both in the supreme and

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circuit courts, and we find it the established policy of the legislature to authorize and to permit each circuit judge to select, appoint and discharge the clerks acting before him or the department over which he presides. The principal object to be accomplished by the last amendment hereinabove quoted, as well as the evil to be remedied, was to separate the duties of the clerks in the supreme and circuit courts and to take from the justices of the supreme court all power or authority in the matter of appointing clerks in the circuit courts, to the end that each court would appoint and remove its own clerks, and such clerks would act only in the court for which appointed, except in the matter of filing papers in the outside circuits by the clerk of the supreme court acting *ex officio*. There is nothing in the statutory provision in question which shows an intent that the three judges in the first circuit should get together and appoint clerks to act in the several divisions, or before the several judges. There is nothing in the statute itself which shows an intent to overturn the settled policy, theretofore pursued, by the legislature, in the provisions which gave each judge in each circuit the power to appoint and remove his own clerk and assistant clerk. The provision now under consideration should not be so construed that the phrases "appointed and removable by the judge or judges thereof, as the case may be," mean that the three judges in the first circuit must get together and act as a body in order to appoint or remove a clerk to act before one of them. Such construction ignores the rules of construction heretofore adverted to and enunciated in Cyc. and in section 14 R. L. 1915; goes beyond the provisions of the statute in question; and, by the rule announced in the majority opinion of this court, requires certain matters of court business to be transacted by the three judges of the first circuit, acting conjointly, contrary to the entire scheme under which the judges act in the said circuit. Chapter 131 R. L. 1915, under the heading "Circuit Courts," provides the mode and manner in which circuit courts transact business in this Territory. By sections 2263, 2265 and 2277, found in

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said chapter, it is especially provided that where two judges or more act in the same circuit each shall act separately, whether in open session of court or in transacting work at chambers, and the whole scheme is for the judges in the first circuit to act separately and independently of each other, so that, in fact, in the first circuit, instead of having one circuit court, we virtually have, in effect, three circuit courts. "It is an established rule in the construction of statutes, that a subsequent statute, treating a subject in general terms, and not expressly contradicting the provisions of a prior act, shall not be considered as intended to affect more particular and positive provisions of the prior act, unless it be absolutely necessary to do so in order to give its words any meaning" (*Fosdick v. Perrysburg*, 14 Ohio St. 472).

The petitioner contends with much force and reason that under the statutory provision being considered each circuit judge has power to appoint and remove the clerks who transact the business of the court, so far as the same is presided over by him. The respondent contends with much earnestness and force that under said provision it requires the joint or concurring action of the three judges to appoint or remove a clerk. We thus have two constructions of this statutory provision by the parties to this proceeding, each differing from the other. These divergent views—neither without grounds therefor—indicate that such provision may mean one of two things, each differing from the other; in other words, that the statute is ambiguous. We must therefore consider the rules for statutory construction under like circumstances. "An ambiguity exists in a statute where it is susceptible of two or more different meanings or applications without doing violence to its terms" (36 Cyc. 1118. See also Lewis' *Suth. Stat. Const.*, Sec. 310). The court should look at the pre-existing law upon the same subject so as to ascertain the changes contemplated by the new statute and should consider the history of the enactment of the statute (*Bank v. Collector*, 3 Wall. 495; *Texas & Pac. Ry. Co. v. Interstate Com. Com.*, 162 U. S. 197; *Ex parte Crow Dog*, 109 U. S. 556; *Bates v.*

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Clark, 95 U. S. 204; *Flanders v. Merrimack*, 48 Wis. 567; *Solomon v. Commissioners*, 41 Ga. 157). The reason and purpose of the new act are considerations of great weight (*Smythe v. Fiske*, 23 Wall. 374). The proceedings of the legislature, especially committee reports made during the progress of the bill through the legislature, may be considered to ascertain the intent of the legislature in enacting it (*Church of the Holy Trinity v. U. S.*, 143 U. S. 457; *Buttfield v. Stranahan*, 192 U. S. 470; *Blake v. National Banks*, 23 Wall. 307; *Hill's Adm'r. v. Mitchell*, 5 Ark. 648; *Edger v. Board of Commissioners*, 70 Ind. 331; *Division of Howard Co.*, 15 Kan. 154; *Fosdick v. Perrysburg*, 14 Ohio St. 472). A contemporaneous construction of the terms of a statute by the legislative or executive department is of high value in determining the intention of the legislature (*U. S. v. Gilmore*, 8 Wall. 330; *Philadelphia etc. R. R. Co. v. Catawissa R. R. Co.*, 53 Pa. St. 20; *Wright v. Forrestal*, 65 Wis. 341, 348). "By one of the most familiar rules for statutory construction, we may and should reject any meaning that may be attributed to the statutes which would lead to an absurd or unreasonable result. It is often said that the true rule to be observed in a situation like the one before us is to look to the whole and every part of the law, to the intent apparent from the whole, to the subject matter, to the effect and consequences, to the reason and spirit, and thereby ascertain the ruling idea present in the legislative mind at the time of its enactment, and then, if the manifest purpose of the lawmakers can thereby be reasonably spelled out of the words they used to express it, to give effect to such purpose, though the meaning thus adopted be quite contrary to the literal sense of the words. *Ogden v. Glidden*, 9 Wis. 46; *Harrington v. Smith*, 28 Wis. 43; *Hartford v. N. P. R. Co.*, 91 Wis. 374. When the legislative will, attempted to be expressed in a statute, is worked out in the manner indicated, it is as much a part of the law and as binding on courts as if literally expressed therein. *State ex rel. Heiden v. Ryan*, 99 Wis. 123; *People ex rel. Att'y Gen. v.*

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Utica Ins. Co., 15 Johns. 358; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 300" (*Wisconsin Industrial School v. Clark County*, 103 Wis. 651, 659).

As shown in the majority opinion, it appears that when house bill 74, which after its enactment became Act 84 S. L. 1911, was pending in the legislature, that the judiciary committee in its report on the bill expressly declared that under the provisions of the bill each judge would have the appointment of his own clerks. There is absolutely nothing in the history of the passage of the bill, as shown by the journals of the house and the senate, showing a contrary opinion, and this construction is in absolute harmony with the pre-existing law, with the settled policy of permitting each circuit judge to select his own clerks, and is in line with the rules of construction shown in the authorities hereinbefore cited. This settled policy is a wise and beneficent one. The relations between a judge and the clerks who record and transact the clerical business of the court presided over by him are somewhat of a confidential nature and the utmost respect and confidence should exist on the part of all of them. This settled policy is evidence that the legislature deemed it best, to procure the best service before the circuit courts in a clerical way, to permit each judge to have the power of appointing and dismissing his own clerks, and this power certainly conduces to the betterment of the service; and I cannot bring my mind to assent to the overturning of this settled policy by the phrases quoted from Act 84 S. L. 1911. In my opinion the use of the word "judge" in the plural was for the reason that in one circuit there are three judges while in the others there is only one, and for the purpose of making the language rhetorical and not for the purpose of requiring concurrent or concurrent action by the judges in the first circuit.

It is well perhaps to call attention to another fact, namely, that under the statute as it now exists the provision incorporated into the statute by Act 54 S. L. 1907, to wit, whereby the clerk of the judiciary department had control of the central office in

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Honolulu and all moneys, records and business in the central office, was repealed and under the present law there is no provision for the outside office, spoken of in the majority opinion, nor has the legislature seen fit, in the statute in question, or in any other statute to which my attention has been called, to prescribe the mode or manner in which circuit judges shall perform their duties except the statute enacted since the controversy herein arose relating to the appointment of court stenographers, and that statute has nothing to do with the solution of any question involved here. The policy of the legislature relating to the appointment of circuit court clerks is to be gathered from the acts relating to the appointment of clerks at the time, and prior to, the appointment of petitioner, and the history of their enactment. Hence, if the rule is established that in the transaction of any of their business, except in the matter of appointing stenographers and interpreters, they must get together and act concurrently, it will be by judicial decision and not by any legislative rule heretofore enacted.

In my opinion the demurrer to the return of the respondent to the alternative writ should be sustained and the reserved question answered in the affirmative.

Scott v. Stuart, 22 Haw. 576.

TERRITORY OF HAWAII EX REL. M. F. SCOTT AND
NETTIE L. SCOTT v. HONORABLE THOMAS B.
STUART, THIRD JUDGE, CIRCUIT COURT, FIRST
JUDICIAL CIRCUIT, TERRITORY OF HAWAII.

MOTION TO QUASH.

ARGUED MAY 12, 1915.

DECIDED MAY 26, 1915.

ROBERTSON, C.J., WATSON AND QUABLES, JJ.

MANDAMUS—*disqualification of judge.*

Where a judge has determined that under the Organic Act of this Territory he is not disqualified from hearing a cause mandamus does not lie to make him reverse that decision and to assign the cause.

OPINION OF THE COURT BY WATSON, J.

In a petition for a writ of mandamus filed in this court on May 1, 1915, seeking to compel Judge Stuart of the first judicial circuit to transfer and assign a certain cause then pending in said first circuit court to some other court or judge having jurisdiction thereof and not disqualified, it is alleged that respondent by reason of a pecuniary interest in the subject matter of said suit is, under section 84 of the Organic Act of this Territory, disqualified to make any order in said cause other than one transferring and assigning the same as aforesaid. An alternative writ was issued from which it appears that on April 3, 1915, a motion to transfer and assign said cause to some other court or judge having jurisdiction thereof was made before Judge Stuart, which motion was based on the alleged disqualification of Judge Stuart, as hereinabove set out, and that said motion "was not granted." On the return day of said writ respondent appeared and moved to quash the same on the ground that said writ does not state nor recite facts sufficient to entitle the relators to the relief demanded nor to any relief whatever as against the supposed grievances in said writ averred.

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If the writ is defective either in form or in substance the defendant may move to quash it. *Dane v. Derby*, 54 Me. 95, 89 Am. Dec. 722, 726; *Ex parte Newman*, 14 Wall. (U. S.) 152, 166; 26 Cyc. 463.

Treating the recital in the writ that the motion to assign said cause was by Judge Stuart "not granted" as an averment that said motion was by him denied, we are of the opinion that a mandamus does not lie in this case. The lower court has passed upon the question before it, and the result, of which complaint is now made, is a judicial determination. If that is erroneous it is a judicial error which cannot be corrected by writ of mandamus. The writ is appropriate to compel subordinate courts to proceed and determine cases pending before them; but in no case does it lie to compel a judicial tribunal to render any particular judgment or to set aside a decision already made. *Ex parte Koon*, 1 Denio 644. "This court cannot by mandamus compel an inferior court to reverse a decision made by it in the exercise of its legitimate jurisdiction." *Ex parte Flippin*, 94 U. S. 348. As was said by the court in the case of *The State of Florida ex rel. P. & L. R. R. Co. v. Van Ness*, 15 Fla. 317, "A mandamus does not lie in this case. The only duty which the judge had to perform was the exercise of his judicial discretion and judgment in the matter of determining his qualifications. This he has done and this writ does not lie to make him reverse his decision even though it be wrong." See also *Ex parte Chambers*, 10 Mo. App. 240.

The motion to quash is granted.

M. F. Scott for petitioners.

J. Lightfoot for respondent.

McBryde Sugar Co. v. Andrade, 22 Haw. 578

McBRYDE SUGAR COMPANY, LIMITED, A CORPORATION, *v.* MANUEL ANDRADE.

APPEAL FROM CIRCUIT JUDGE, FIFTH CIRCUIT.

HON. L. A. DICKEY, JUDGE.

ARGUED MAY 24, 1915.

DECIDED JUNE 3, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EQUITY—injunction—jurisdiction.

Equity has jurisdiction to protect a legal right in property by injunction where plaintiff's right is clear and the court is of the opinion, on the evidence before it, that there is no substantial dispute as to it, though the right is denied and it has not been established at law.

SAME—restraining commission of criminal acts.

Where the issuance of an injunction is warranted by the necessity of protection to legal rights in property, the commission of criminal acts may incidentally be enjoined.

WORDS AND PHRASES—"or"—"and."

The word "or" is sometimes used in the copulative sense and as synonymous with "and" in deeds and contracts as well as in statutes. The word will be so construed whenever it is evident that it was intended to have that effect.

EASEMENTS—injunction—irreparable injury.

Injunction will lie to protect the owner of an easement in its enjoyment when the injury complained of is irreparable, or the interference is of a continuous character, or the remedy at law for damages will not afford an adequate remedy.

APPEAL AND ERROR—decree—questions not raised in lower court.

While an appeal from a final decree in equity brings up the whole case for review, a proper decree granting appropriate relief need not be modified merely because it has not expressly covered matters incidental to the main issues as to which no question was raised in the lower court.

INJUNCTION—modification of.

Where an injunction awarded by a decree in equity is broader than the decree it may be modified upon application to the circuit judge, and the affirmance of the decree on appeal will not preclude such action.

McBryde Sugar Co. v. Andrade, 22 Haw. 578.

OPINION OF THE COURT BY ROBERTSON, C. J.

This is an appeal from a decree made and entered by the judge of the circuit court of the fifth judicial circuit granting an injunction to restrain the defendant from interfering with, hindering or obstructing the plaintiff in its use, repair or maintenance of a certain waterway lying and being in and upon and running through the premises of the defendant, situate at Kalaheo, Island of Kauai, known as homestead lot No. 49, and described in land patent No. 5491. The plaintiff alleged and proved a right to the use of the waterway under a grant from the government to one Isenberg, dated August 29, 1902, of certain ditch, flume, pipe and railroad ways and reservoir sites in the land of Kalaheo, "also the right, without charge, to develop water on the said land of Kalaheo and to appropriate to his own use and divert the same by most practicable route to Wahiawa or Lawai in said district of Koloa until the 25th day of May 1949, provided all development of said water under this grant to cease in five years after the expiration of the present lease of Kalaheo from the crown commissioners." The lease referred to expired on February 15, 1909. It was further specified in the grant that "this indenture, however, is not intended to convey and does not convey to the grantee, his heirs or assigns, any right whatever in or to the natural flow of any water or waters on said land of Kalaheo, or the right to any diminution thereof after the expiration of said lease; but the same shall be and remain as heretofore vested in the government." The defendant in his answer denied the right and title to the easement set up by the plaintiff, and the first point for consideration is in the contention that a perpetual injunction will not be granted to protect legal rights in property unless the plaintiff's title is admitted or has been established at law and that equity will not ordinarily try a disputed title. In *McBryde Sug. Co. v. Koloa Sug. Co.*, 19 Haw. 106, a case analogous in principle to the case at bar, where the rule in question was invoked, this

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court said (at page 118), "The limitation of the rule is that when the legal right is reasonably clear and there is no uncertainty of the principles of law involved, its establishment at law is not required but equity will ascertain the existence of the right as well as protect it. This is especially true of illegal diversion of water and illegal interference with water rights." Injunctive relief may be granted where the plaintiff's right is clear and the court is of the opinion, on the evidence before it, that there is no substantial dispute. 6 Pom. Eq. Jur. Sec. 549; *Richmond v. Bennett*, 205 Pa. St. 470; *Robertson v. Meyer*, 59 N. J. E. 366. In the case at bar there is no substantial dispute as to the plaintiff's right in the easement as claimed. The patent for the defendant's lot was issued to him on May 5, 1911. He had been in possession of the premises for three or four years prior to that date under a right of purchase lease. The patent did not except the right previously granted to Isenberg but the prior grant had been duly recorded and the defendant took title subject to that grant. The waterway in question lies in a natural gulch which extends across the lower portion of the defendant's lot, and the evidence showed that besides a small natural flow of water running therein (the right to the use of which by the defendant is not disputed) water developed by the plaintiff prior to the acquisition of any rights by the defendant has been taken whenever needed and available through the way to plaintiff's cane fields and laborers' camps at Lawai. There has been no abandonment of the easement by the plaintiff. In this connection a point was raised by defendant's counsel upon the construction of the grant to Isenberg as to whether the grantee was given the right to take water across the land of Kalaheo to both Wahiawa and Lawai, but the grant could as well be construed by the court sitting in equity as at law. In short, there is no substantial dispute as to the facts bearing upon the plaintiff's title requiring an adjudication at law. The question of construction referred to arises out of the language used in the grant to Isenberg whereby the right was given to

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develop and appropriate water "and divert the same by most practicable route to Wahiawa or Lawai," the contention of counsel for the defendant being that as public grants are to be construed against the grantee it should be held that this grant conferred the right to divert water to either Wahiawa or Lawai, but not to both, and that as it was shown that the plaintiff was taking water to Wahiawa it was without right to take it to Lawai also. Dealing with this argument the circuit judge, in his decision, said "I construe the language differently. Both branches of the ditch are shown on the map accompanying the grant and are expressly described in it, and various reservoir sites are granted. It was plainly the idea of the government that the grantee would cultivate both in Lawai and Wahiawa and use water in both places." We agree with this view. The map appended to the grant and by reference made a part of it indicates a ditch leading from reservoir No. 1 to the stream which runs through the defendant's lot at a point above his lot; it shows that stream leading down to "proposed" reservoir No. 21; and it shows another ditch connecting with reservoir No. 14 near the boundary of Lawai. Further, the testimony showed, and the circuit judge found, that this was the most practicable route by which to take the developed water to the plaintiff's cane fields and camps at Lawai. The respective lands of Wahiawa and Lawai lie on opposite sides of the land of Kalaheo upon which the water was developed and from which the right to divert it was granted. Unless the phrase "and or" was to be used the word "or" was no less appropriate to express the intention than the word "and" would have been. The word "or" is sometimes used in the copulative sense and as synonymous with "and" in deeds and contracts as well as in statutes. The word will be so construed whenever it is evident that it was intended to have that effect. *Chapin v. Tisdale*, 5 Haw. 52; *Estate of Parker*, 19 Haw. 393, 397; *Kennedy v. Haskell*, 67 Kan. 612, 616; *Ranch Co. v. Stratton*, 22 Colo. App. 577; 29 Cyc. 1506.

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In contending that the plaintiff has an adequate remedy at law counsel for the defendant urge that equity will not restrain threatened criminal acts, nor enjoin threatened injury to growing crops where the damage can be forevalued and recovered at law. The testimony showed that on March 31, 1914, the defendant had assaulted and struck the manager of the plaintiff corporation upon the entry of the latter upon defendant's lot with workmen for the purpose of cleaning the waterway. It also appeared that upon being prosecuted criminally for the battery the defendant had been acquitted. The evidence as to the conduct of the defendant on the date mentioned was important only in showing, in connection with his denial of plaintiff's right in the easement, his determination to maintain his view by the use of force. Counsel erroneously assume that the plaintiff by its bill in this case sought an injunction primarily against the criminal use of force. The bill prayed for and the decree granted an injunction to conserve the easement and to protect the plaintiff in the use of it according to its right. The commission of criminal acts is restrained incidentally and in so far only as they would tend to interfere with such use. Where the intervention of equity by injunction is warranted by the necessity of protection to civil rights or property interests the mere fact that a crime or statutory offense must be enjoined as incidental thereto will not operate to deprive the court of its jurisdiction. 22 Cyc. 902. It was not alleged or shown that the defendant in this case is insolvent, and it is contended that as the damage to a growing crop may be proven and recovered in an action at law the plaintiff was not entitled to the relief granted by the decree appealed from. It was shown by uncontradicted testimony that the waterway in question is apt to become clogged and the passage of the water obstructed by the growth of grass and weeds so that it is necessary to clean it from time to time; that it required cleaning on the occasion of the assault on plaintiff's manager; and that on a previous occasion when employees of the plaintiff went upon the defendant's

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land to clean the waterway the defendant had driven them off. The principle involved is the same as though an actual diversion of the water by the defendant had been alleged and shown. The right of the plaintiff to have its water flow across the defendant's lot without obstruction, and, incidental thereto, the right to enter upon the lot for the purpose of removing obstructions, was a continuing right interference with which might not only damage the crop of cane then growing upon the land of Lawai, but would injuriously affect future cultivation of the land, and perhaps eventually deprive the plaintiff of the easement entirely. Irreparable injury thus was shown. "Permanent appropriation of property may be an irreparable injury for which the law gives no adequate remedy such as equity gives." *McBryde Sug. Co. v. Koloa Sug. Co.*, supra. "It is well settled that injunction will lie to protect the owner of an easement in its enjoyment. Wherever the injury complained of is irreparable, or the interference is of a permanent or continuous character, or the remedy at law by an action for damages will not afford adequate remedy, injunction is a proper remedy." 14 Cyc. 1216, 1217.

On behalf of the defendant two points have been urged in this court as to which no question seems to have been raised in the court below, viz.: that the defendant is entitled to prior notice of the intention of the plaintiff to enter upon his premises for the purpose of cleaning the waterway, and that the waterway, for the sake of certainty, should have been particularly described in the decree. Assuming that these two matters should have been ruled upon in accordance with the contention had the points been raised, the omission to cover them does not affect the correctness of the decree. The defendant's right to notice, if it existed before the decree, has not been abrogated by it. And as to the waterway in question, there appears to have been no misunderstanding or dispute between the parties as to its identity, location or limits. While an appeal from a final decree in an equity suit brings to this court the whole case

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for review, a proper decree granting appropriate relief need not be modified merely because it has not expressly covered matters incidental to the main issues as to which no question was raised in the court below.

Finally, it is urged that the decree and the injunction are too broad and go beyond the case presented by plaintiff's bill. We think the decree, properly construed, is not open to the objection made. The waterway is described in the decree as "a waterway for carrying water by direct flow and by seepage from the plaintiff's reservoir No. 1 * * * to plaintiff's cane fields in Lawai" but the prohibition of the injunction authorized is against interfering with or obstructing the plaintiff in its use and repair "of said waterway lying and being in and upon and running through the said Kalaheo Homestead Lot No. 49 and described in land patent 5491." This was the limit of the relief to which the plaintiff was entitled under the case made. It was not claimed that the defendant had interfered or threatened to interfere with plaintiff's use and enjoyment of its easement elsewhere than within his premises. The injunction, however, is open to the objection made in that its inhibitory provisions extend to the waterway in its entire length. It commands the defendant to refrain from hindering or obstructing the plaintiff "in its use and enjoyment of an easement of way in and along the stream bed or bottom of the natural gulch extending from the waterfall above the hereinafter described land of the defendant through and below said land * * * from its reservoir No. 1, * * * to its cane fields in Lawai" etc. The defendant, on application to the circuit judge, would be entitled to have the injunction modified so as to make it accord with the decree. The affirmance of the decree will not preclude such action.

Decree affirmed.

L. J. Warren (Smith, Warren, Hemenway & Sutton on the brief) for plaintiff.

R. J. O'Brien (E. C. Peters with him on the brief) for defendant.

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HONOLULU ATHLETIC PARK, LIMITED, A CORPORATION, v. H. G. LOWRY, BILLY ORR, CHARLEY REISBERG, JUSTIN FITZGERALD, ROY McARDLE, JOHNNY KANE, "TOOTS" BLISS, CLAUDE WILLIAMS, LOU KENNEDY, JIM SCOTT, ED. KLEPFER, FRED DERRICK, DON RADER AND JACK BLISS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

SUBMITTED JUNE 3, 1915.

DECIDED JUNE 12, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

PLEADING—amendment—demurrer—specific performance—injunction.

Where an amended bill in equity seeking a decree of specific performance of a contract and an injunction to restrain the respondent from violating the terms of the contract shows on its face that the contract provided for a series of ball games to be played between certain dates, and the time within which such ball games were to have been played had expired prior to the time of filing the amended bill, the performance of the contract thereby becoming impossible, a demurrer to the amended bill was properly sustained. As both the remedy for specific performance and injunction were lost by lapse of time, the court was at the time of the filing of the amended bill powerless to grant the complainant either remedy.

OPINION OF THE COURT BY QUARLES, J.

November 25, 1914, the complainant filed its bill in equity to obtain a decree for the specific performance of a certain contract entered into by it and the respondent H. G. Lowry, and also seeking an injunction against the said H. G. Lowry and his co-respondents (thirteen in number), enjoining them from playing baseball at any place within the Territory of Hawaii other than the park of the complainant in Honolulu. To the original bill of complaint, the respondents, other than Lowry,

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filed their demurrer which the circuit judge sustained. Thereupon complainant moved for leave to file an amended bill of complaint against the said co-respondents, which motion was denied and a decree was entered sustaining said demurrer and dismissing the suit as to the said thirteen co-respondents of respondent Lowry. That decree was appealed to this court and was affirmed. The facts of the case are set forth in the former opinion of this court (ante pp. 475-478), to which reference is here made. The circuit judge permitted the complainant to file an amended complaint as against the respondent Lowry, which amendment was filed December 23, 1914, in which it prayed for an injunction restraining the respondent Lowry from playing his said co-respondents in any game on Wednesdays, Saturdays, Sundays and holidays prior to the 15th day of December, 1914, at any place other than the ball grounds of the complainant, and prayed for specific performance of the contract between it and the said respondent Lowry, the substance of which is set forth in the former opinion herein, the principal features of which are as follows: that respondent Lowry should furnish to complainant the services of either the Venice baseball team or one other of the teams playing in the Pacific Coast League or an all-star aggregation of players, to be chosen from the Pacific Coast League, National League or American League, to play a series of games at the grounds of the complainant for a season beginning with Saturday, November 10, 1914, and ending December 14, 1914, respondent Lowry to pay all expenses of the team to be brought by him, and the complainant to furnish its park in good condition, with all assistants necessary to collect the gate receipts and preserve decorum; respondent Lowry to allow the complainant \$50 for each game on Saturdays and Sundays and fifteen per cent. of the gate receipts, the remainder to be paid to the respondent Lowry; the matter of fixing price of admission and issuing passes to grounds when games were being played to be determined by mutual agreement of both parties. The amended bill contained allega-

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tions, in addition to those contained in the original bill, to the effect that the respondent Lowry entered into a contract with his co-respondent J. J. Bliss, acting for the other respondents, wherein it was agreed that said respondents, other than respondent Lowry, should play seven games of baseball in Honolulu between the 17th day of November, 1914, and the 15th day of December, 1914; that the co-respondents of the respondent Lowry knew and understood that the games were to be played at the grounds of the complainant and entered into their contract with said respondent Lowry with reference to the said contract between complainant and respondent Lowry, and did, after arriving in Honolulu, agree to play at the grounds of the complainant under the contract between complainant and respondent Lowry, but after playing two games at the grounds of complainant that the said respondent Lowry and said other respondents combined and concerted together to injure the complainant and refused to play further games at the grounds of complainant and threatened to play at an opposition baseball park. The principal object of the amended bill seems to have been to endeavor to tie the members of the Venice baseball team, the co-respondents of respondent Lowry, to the contract entered into between the complainant and the respondent Lowry. To this amended bill of complaint the respondent Lowry filed his demurrer upon numerous grounds, among others, that, under the provisions of section 10 of the Organic Act of the Territory of Hawaii the contract between the complainant and the respondent Lowry, calling for personal services, cannot be specifically performed by decree; that the contract alleged to have been made by the respondent Lowry on the one part, and his co-respondent Bliss, acting for the other respondents, on the other part, was a contract calling for personal services and under said section of the Organic Act cannot be specifically performed by decree of court; that the said amended bill of complaint shows on its face that complainant is not entitled to the relief therein demanded. This last demurrer was sustained, and the

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complainant electing to stand upon its amended bill of complaint, judgment of dismissal was regularly entered, from which the complainant has appealed.

We think the demurrer was properly sustained. At the time the amended bill of complaint was filed, December 23, 1914, the time within which the games of baseball were to have been played had expired, and even if the court was authorized to decree specific performance of a contract calling for personal services, the court could not recall the time that had passed and require the respondent Lowry to have the games of baseball played called for at the time and in the manner provided in the contract. In other words, at the time of filing the amended bill of complaint it was impossible for the respondent Lowry to perform the contract and for that reason the court was powerless to compel him to do so by decree of specific performance. For this reason the amended bill of complaint did not present a case in equity authorizing a decree of specific performance. This is also true of the amended bill of complaint in so far as it relates to the remedy of injunction. The time within which the complainant sought to have the co-respondents enjoined from playing the games of baseball at places in the Territory of Hawaii, other than the park of the complainant, having passed, it would be an idle thing to enjoin them from playing at dates which had already passed. As to this feature the court was powerless to grant the injunction sought. The question as to whether either remedy was available prior to December 15, 1914, became purely a moot question. This disposes of the material question raised by this appeal.

The decree appealed from is affirmed with costs to the respondent.

E. C. Peters and *R. J. O'Brien* for complainant.

Lorrin Andrews and *C. H. McBride* for respondent *H. G. Lowry*.

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IN THE MATTER OF THE APPLICATION OF CLARENCE D. PRINGLE FOR A WRIT OF MANDAMUS AGAINST JAMES BICKNELL, AUDITOR OF THE CITY AND COUNTY OF HONOLULU, TERRITORY OF HAWAII.

PETITION FOR WRIT OF MANDAMUS.

ARGUED JUNE 1, 1915

DECIDED JUNE 16, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

MANDAMUS—courts—jurisdiction.

Under the statutes of this Territory in cases of mandamus where the writ is directed to individuals original jurisdiction is vested in circuit judges at chambers, the jurisdiction of the supreme court in such cases being appellate only.

COURTS—supreme court—appellate court.

The supreme court of this Territory is primarily a court of appeal and has such original jurisdiction only as has been expressly, or by necessary implication, conferred upon it by law.

OPINION OF THE COURT BY ROBERTSON, C. J.

(Quarles, J., dissenting.)

In this case, upon the petition of Clarence D. Pringle for a writ of mandamus against James Bicknell, auditor of the city and county of Honolulu, the chief justice issued an alternative writ returnable before this court on May 24, 1915. On the return day, there being some doubt as to the jurisdiction of the court where, as in this case, the writ is directed to an individual, counsel were requested to present argument on the point. They have done so. The majority of the court are of the opinion that this court is without jurisdiction under the circumstances and that the writ in this case must therefore be dismissed.

In section 1 of "An Act to define the nature and to regulate the issuing of Writs of Mandamus" etc., approved on the 19th day of September, 1876, the writ was thus defined: "This is an order issuing in the name of the Sovereign, by the supreme

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court in term or any justice thereof in vacation, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing him or it to perform some certain act belonging to the place, duty or quality with which he or it is clothed." By the law, as it existed at the time, jurisdiction to issue writs of mandamus "to courts of inferior jurisdiction, to corporations and individuals" resided in the supreme court and the justices thereof. (C. C. 1859, Sec. 831; Cp. L. p. 238.) No such power was conferred on the circuit judges, until by the "Act to Reorganize the Judiciary Department," approved November 25, 1892, it was provided that "The judges of the several circuit courts shall have power in chambers within their respective jurisdictions, but subject to appeal * * * to issue writs of * * * mandamus * * * to courts of inferior jurisdiction, to corporations and individuals." (S. L. 1892, Ch. 57, Sec. 37; R. L. 1915, Sec. 2272.) By the same statute it was provided that the supreme court, in addition to its appellate jurisdiction, shall have "original jurisdiction in all questions arising under writs of * * * mandamus * * * directed to circuit courts, or to circuit judges, or to magistrates, or to other judicial tribunals" (S. L. 1892, Ch. 57, Sec. 51; R. L. 1915, Sec. 2252) and that the several justices of the supreme court shall have power "to issue writs of * * * mandamus to circuit courts and circuit judges * * * which writs shall be returnable before the supreme court." (S. L. 1892, Ch. 57, Sec. 53.) The section last quoted was amended in 1903 by the addition, after "circuit judges" of the words "district magistrates and other judicial tribunals." (S. L. 1903, Ch. 32, Sec. 14; R. L. 1915, Sec. 2253.) These provisions relating to jurisdiction have not since been changed. The act of 1892 did not expressly amend the act of 1876, but in the revision of 1905 the word "Territory" was substituted for "Sovereign," the words "in term" were omitted, and the words "or a circuit judge" were inserted in place of "in vacation," in section 1 of that act (R. L. 1905, Sec. 2010) and it has not since been amended. (R. L. 1915, Sec. 2675.) Another

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provision referred to in argument is section 2682 of the Revised Laws of 1915. It reads as follows: "The party wishing to obtain an order in any of the cases before mentioned, must apply by petition addressed to the justices of the supreme court, or to any single justice thereof, or to a circuit judge, stating the nature of his right" etc. This originally was section 9 of the act of 1876, and was amended in the revision of 1905 (Sec. 2017) by the insertion of the words "or to a circuit judge" to harmonize with the provisions of the Judiciary Act of 1892, as in the case of Section 2010. The general provisions relating to mandamus were thus made to conform to the law conferring jurisdiction to issue the writ as had been the case prior to the passage of the Judiciary Act of 1892.

The contention of counsel for the petitioner is that under chapter 151 of the Revised Laws of 1915 (which includes Secs. 2675 and 2682) there is concurrent jurisdiction in the supreme court, the justices thereof, and the circuit judges, to issue writs of mandamus directed to individuals as well as to courts of inferior jurisdiction. We are unable to take this view. The general provisions of sections 2675 and 2682 (R. L. 1915) must be read in the light of and construed together with sections 2252, 2253 and 2272, they being *in pari materia*. "Laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another." R. L. 1915, Sec. 11. Thus construed it is clear that while this court has original jurisdiction in mandamus in cases where the writ is directed to a circuit court, circuit judge, magistrate, or other judicial tribunal, the jurisdiction to issue the writ against an individual in the first instance has been confided to the circuit judges, the jurisdiction of this court in such cases being appellate only. Sections 2675 and 2682 are definitional in character while sections 2252, 2253 and 2272 confer jurisdiction. There is no inconsistency between these sections, and no question of a repeal by implication is involved.

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It is contended that the supreme court of this Territory is a court of general original common law jurisdiction and, therefore, has inherent power to issue writs of mandamus. (See 26 Cyc. 388.) Aside from the fact that the alternative writ in this case was not issued by the court, but by one of the justices, the contention is based upon a misconception of the place of this court in the judiciary system of this Territory as founded in the Judiciary Act of 1892. This is not a court of general original common law jurisdiction, but is, primarily, a court of appeal and has such original jurisdiction only as has been, expressly or by necessary implication, conferred upon it by law. See *Rep. v. Saku Tokuji*, 9 Haw. 548, 551; *Estate of Bishop*, 11 Haw. 33; *Wahiawa Sug. Co. v. Waialua Agl. Co.*, 13 Haw. 109. The former statute (C. C. 1859, Sec. 831) which conferred jurisdiction to issue the writ in all cases upon the supreme court and the justices thereof having been expressly repealed by the act of 1892 (S. L. 1892, Ch. 57, Sec. 80) which divided the original jurisdiction in mandamus between the supreme court (and its justices) and the circuit judges at chambers whereby the jurisdiction of the former was specified to be in cases where the writ is directed to judges and judicial tribunals, and of the latter in cases where the writ is directed to courts of inferior jurisdiction, corporations and individuals, there is no room for implication, necessary or otherwise, that it was the intent of the legislature that there should be concurrent jurisdiction where the writ goes against individuals.

Further, it is contended that this court should take jurisdiction of this proceeding under section 2251, R. L. 1915, which provides that "The supreme court shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses therein where no other remedy is expressly provided by law." It is averred in the petition that all the circuit judges of the first judicial circuit are disqualified from hearing the matter and it is argued that the petitioner, therefore, is without remedy within the meaning of the statute.

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There is no merit in this contention as, if all the circuit judges of the first circuit are in fact disqualified (which the respondent denies), a judge of one of the other circuits would be designated and authorized to hear the matter under the provisions of R. L. 1915, Sec. 2277.

For the reasons stated the alternative writ is dismissed.

Lorrin Andrews and *E. C. Peters* for petitioner.

J. W. Cathcart and *F. W. Milverton* for respondent.

DISSENTING OPINION OF QUARLES, J.

The only question upon which the dismissal or refusal to dismiss the alternative writ of mandamus heretofore issued in this proceeding depends is one of jurisdiction—whether this court or a justice of this court may issue the writ to a public official commanding him to perform some official act which it is his legal duty to perform. All reference to sections herein, unless otherwise specified, are to the Revised Laws of 1915. Section 2252, originally enacted in 1892, simply defines the appellate jurisdiction of this court. Section 2253 relates to the issuance of certain writs, including that of mandamus, to certain courts and parties litigant therein in aid of the appellate jurisdiction of this court. Section 2254 provides: "The supreme court shall have power to compel the attendance of witnesses and the production of books, papers and accounts; to make and award all such judgments, decrees, orders and mandates; to issue all such executions and other processes, and to do all such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by the laws or for the promotion of justice in matters pending before it." Section 2272, as limited by section 2273, grants jurisdiction to circuit judges to issue writs of mandamus "to courts of inferior jurisdiction, to corporations and individuals," but does not provide that such jurisdiction shall be exclusively in the circuit judges. Section 2675, quoted in the majority opinion, which was in force in 1892, when sections 2252, 2253

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and 2272 were enacted, and which has been in force at all times since it was enacted in 1876, expressly declares, as to mandamus, as follows: "This is an order issuing in the name of the Territory, by the supreme court or a justice thereof or a circuit judge, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing him or it to perform some certain act belonging to the place, duty or quality with which he or it is clothed." Here is legislative sanction, in positive terms, to the issuance of the writ of mandamus by this court, or a justice of this court, addressed to an individual, corporation or court of inferior jurisdiction. This shows original jurisdiction in this court and in a justice thereof to issue writs of mandamus concurrently with circuit judges, addressed to individuals, corporations or inferior courts. Jurisdiction in its legal sense to issue the writ is the right, power or authority to issue it. It is the right of administering justice or doing judicial acts through the law by the means which the law has provided for that purpose. *Mills v. Commonwealth*, 13 Pa. St. 627, 630; *State v. Smith*, 29 R. I. 513. One statute may grant appellate jurisdiction to a certain court and another original jurisdiction to the same court in the same class of cases; or the same statute may grant a court appellate jurisdiction in one section in a certain class of cases and original jurisdiction in another section as to the same class of cases. A general grant of jurisdiction to one court in one statute does not impliedly repeal a special grant of jurisdiction to another court in another statute. *Loomis v. Bourn*, 63 Conn. 445.

In my opinion the enactment of sections 2272 and 2273, granting jurisdiction to circuit judges to issue writs of mandamus, while a special grant of original jurisdiction to circuit judges, does not amend or modify or change the provisions of section 2675, and does not repeal, by implication, that portion of the latter section authorizing this court or a justice thereof to issue such writs to private individuals, corporations and inferior courts. All of the sections herein named and those cited

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and quoted in the majority opinion can be harmonized so as to give effect to each and every one of them, and in construing and interpreting such statutes it is the duty of the court to harmonize them, if possible, so as to give force and effect to all of the statutes bearing upon the question here considered. The correct rule as to the repeal of a statutory provision by implication is stated in a recent case decided by the supreme court of the United States (*Washington v. Miller*, 235 U. S. 422), where the court, in speaking of repeals by implication, at page 428 said: "First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (*United States v. Healey*, 160 U. S. 136, 146; *United States v. Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend v. Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, Id. 556, 570; *Rodgers v. United States*, 185 U. S. 83, 87-89); third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

Sections 2252 and 2253 are general grants of appellate jurisdiction, and jurisdiction in aid of its appellate jurisdiction, to this court and a justice thereof. Section 2272, as limited by section 2273, is a general grant of jurisdiction to circuit judges as to the issuance of writs. Section 2675, as I read it, is a special grant of jurisdiction to this court and to the justices thereof and to circuit judges. Under the rule announced in *Washington v. Miller*, supra, the jurisdiction vested in the supreme court and a justice thereof, to issue writs like the one issued by the chief justice in this proceeding, not having been expressly repealed by the Judiciary Act of 1892, or any subsequent statute, was not repealed by implication, and before it can be properly

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held that this court or a justice thereof cannot issue the writ in question here it must be held that a large portion of section 2675 has been repealed by implication. It is a well settled rule for statutory construction that in construing subsequent amendatory statutes the court must hold that no changes in the prior existing statutes were intended except such as were expressly made or necessarily implied. In addition to the authorities cited in my dissenting opinion *In re Pringle* (ante, p. 569), and to which I again refer, see Bishop on Statutory Crimes, 3 ed. Secs. 82, 86. "The jurisdiction of one court is not taken away by an affirmative statute giving the same to another. Either can then hear the cause, at the election of the suitor. For example, 'If, by a former law,' says Blackstone, 'an offense be indictable at the quarter sessions and the latter law makes the same offense indictable at the assizes, here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either, unless a new statute subjoins express negative words, as that the offense shall be indictable at the assizes and not elsewhere.'" Bishop on Statutory Crimes, 3 ed. Sec. 164. No intent, unless it be by implication, can be gathered from the statutes relating to the issuance of writs of mandamus to confine original jurisdiction to issue writs of mandamus to individuals or corporations to the circuit judges, or to exclude such jurisdiction from the supreme court or a justice thereof. This being true, full force and effect should be given to section 2675 and to all of the said sections. In the latter section, as I read it, legislative sanction or consent that this court, or a justice thereof, shall issue a writ like the one in question here is found, and in my opinion full force and effect should be given to that section, which cannot be done if it be held that this court is not authorized to issue the alternative writ heretofore issued in this proceeding.

Therefore, in my opinion, giving full force and effect to all of the statutes bearing upon the question here discussed, there is no doubt that this court, or a justice thereof, may issue a writ

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of mandamus to an individual or corporation. Wherefore it is my opinion that the alternative writ, heretofore issued in this proceeding by the chief justice, was properly issued, and the same should not be dismissed, but the proceeding should be heard and determined on its merits.

TERRITORY OF HAWAII *v.* HOO KOON.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MAY 28, 1915.

DECIDED JUNE 16, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CRIMINAL LAW—*arrests.*

Under section 3726 R. L. 1915 the right of the police to arrest without a warrant is not limited to felonies, and under section 3731 R. L. 1915 the officer may, if he has reasonable cause to believe that an offense has been or is being committed, enter a house to arrest an offender.

CONSTITUTIONAL LAW—*search and seizure.*

Where the police, without a warrant, arrest a person for having opium unlawfully in his possession, they may search the person of the one so arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which such person is arrested.

SAME—*same—articles unlawfully in possession of person arrested.*

Where a person is lawfully arrested in his room for having opium in his possession and the police, in making such arrest, without a search warrant search the room of the offender and seize certain opium and opium pipes found therein, the same should be treated as tools used for the perpetration or attempted perpetration of crime and may be held to be used in evidence (if otherwise admissible) to prove the charge on which such person is arrested; and such search and seizure is not in violation of the rights of the defendant under the Fourth Amendment to the Constitution of the United States.

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OPINION OF THE COURT BY WATSON, J.

The petitioner in this proceeding, hereinafter designated the defendant, was on October 21, 1914, convicted and sentenced by the district magistrate of Honolulu on a charge of unlawfully having in his possession certain opium contrary to the provisions of Act 144 S. L. 1913 (Sec. 2075 R. L. 1915). That section provides as follows:

"Any person who shall use or smoke opium or have the same in his possession, except as provided in sections 2072 and 2074, shall be guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars or more than one hundred dollars, or by imprisonment not more than six months." (Sec. 2075.)

The defendant appealed to the circuit court and before the time for trial in that court filed the following petition:

"Now comes the above named defendant and states that he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, and that he resides in and occupies a home on Hotel Street near Maunakea Street, in said City.

"That on or about the 18th day of October, A. D. 1914, certain officers of the Police Department of the City and County of Honolulu, unlawfully and without warrant or authority so to do, and against the will and consent of the petitioner herein, entered his room and dwelling place and seized certain shells and their contents, which said contents are alleged to be opium, and certain other articles alleged to be opium pipes, contained in said room and dwelling place; in violation of Articles 4 and 5 of the Amendment to the Constitution of the United States.

"That John W. Cathcart, City and County Attorney of the City and County of Honolulu, Territory of Hawaii, Arthur McDuffie, Captain of Detectives of the City and County of Honolulu, Territory of Hawaii, and Charles H. Rose, Sheriff of the City and County of Honolulu, Territory of Hawaii, took the above described property so seized into their possession, and have failed and refused to return the same to this petitioner.

"That heretofore and on, to-wit, the 24th day of February, A. D. 1915, demand was made upon the said John W. Cathcart, Arthur McDuffie and Charles H. Rose to return to petitioner herein the said personal property so unlawfully seized, but to return the same or any portion thereof, the said John W. Cath-

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cart, Arthur McDuffie and Charles H. Rose refused and still refuse, all of which appears by the Demand, a copy of which*is hereto attached and made part hereof.

"That said property is being unlawfully and improperly held by said Sheriff, City and County Attorney, and Captain of Detectives, in violation of petitioner's rights under the Constitution of the United States.

"That said City and County Attorney purposes to use the said personal property so taken from the petitioner as aforesaid at the trial of the above entitled cause, and that by reason thereof and of the facts above set forth, petitioner's rights under the amendments to the Constitution of the United States aforesaid have been and will be violated unless the Court orders the return prayed for.

"Wherefore, petitioner prays that the said Sheriff, the said City and County Attorney, and the said Arthur McDuffie, Captain of Detectives, may be ordered and directed to return and deliver the said personal effects and property to petitioner herein."

At the hearing on this petition (February 24, 1915) the city and county attorney, on behalf of the Territory of Hawaii, interposed an oral demurrer to the sufficiency of said petition and the trial court reserved to the supreme court the question: "Should the demurrer to the petition be sustained."

The undisputed facts in this case are that on the 18th day of October, 1914, certain members of the police force of the city and county of Honolulu, Territory of Hawaii, entered the room of the defendant in Honolulu and took defendant into custody, at the same time taking from a table and from the drawer of a stand in said room certain shells and their contents, alleged to be opium, and certain pipes, alleged to be opium pipes, and having conducted defendant to the police station duly entered a charge against him for violating the provisions of Act 144 S. L. 1913 (Sec. 2075 R. L. 1915), by unlawfully having in his possession certain opium. Defendant was arrested without a warrant and the police officers did not have a search warrant. Defendant appeared in the police court on October 19, 1914, when

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the above charge was entered against him. On October 21 defendant was tried for said offense by the district magistrate of Honolulu and upon such trial was convicted and sentenced to pay a fine of \$50, costs being remitted.

Preliminarily it is contended by counsel for the Territory that the application for a return of the articles demanded is not seasonably made and that defendant has waived his right to such return (if any such right existed) by submitting to a trial in the district magistrate's court and permitting said articles to be introduced in evidence against him without objection. Assuming that these facts are properly before us, i. e., that the defendant did submit to a trial before the district magistrate and permit said articles to be introduced in evidence against him, without objection, although such facts do not appear from the petition, to a consideration of the allegations of which counsel for defendant claims we are limited, we are, nevertheless, of the opinion that the contention advanced by counsel for the Territory, that the application for the return of the articles demanded is not seasonably made, is without merit. On a general appeal to the circuit court from a judgment rendered by the district magistrate the case comes up *de novo* (*Jardin v. Madeiros*, 9 Haw. 503; *Territory v. Marshall*, 13 Haw. 85), and the fact that the defendant, before the district magistrate, may have permitted certain evidence to be received against him, without objection (if such be the fact), would in no wise prevent him from objecting to the admission of such evidence or raising a constitutional question as to its competency in the circuit court upon appeal. Counsel for petitioner cites and relies upon the case of *Weeks v. United States*, 232 U. S. 383. That case involved "the validity under the Fourth Amendment of a verdict and sentence and the extent to which the private papers of the accused, taken without a search warrant, can be used against him" (p. 384), and it was there held, quoting from the syllabus: "The federal courts cannot, as against a seasonable application for their return, in a criminal prosecution, retain for the pur-

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poses of evidence against the accused his letters and correspondence seized in his house during his absence and without his authority by a United States marshal holding no warrant for his arrest or for the search of his premises."

We think the case at bar is clearly distinguishable from *Weeks v. United States*. In the last mentioned case a seizure had been made of private papers and other articles to be used as evidence against the defendant. The papers themselves were not, and so far as appears from the reported case none of the articles seized were, unlawful; all were the property of the defendant and rightfully in his possession. But in this case it appears from the allegations of the petition that the articles seized are *alleged* to be opium and opium pipes. In the absence of any denial on the part of the defendant that such articles are what they are alleged to be we must assume that the articles, the return of which is petitioned for, are in fact opium and opium pipes. The possession of opium is made a criminal offense under the laws of the Territory, as is also the smoking of opium (Sec. 2075 R. L. 1915).

There is no contention by the defendant in this case that his arrest without a warrant was without authority of law or that such arrest violated any constitutional right. Sections 3725, 3726 and 3731 of the Revised Laws of 1915 provide as follows:

"Whenever a crime is committed, and the offenders are unknown, and any person shall be found near the place where the crime was committed, either endeavoring to conceal himself, or endeavoring to escape, or under such other circumstances as to justify a reasonable suspicion of his being the offender, such person may be arrested without warrant." (Sec. 3725.)

"Policemen or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, may, without warrant, arrest and detain for examination such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense." (Sec. 3726.)

"Whenever it is necessary to enter a house to arrest an offender, and entrance is refused, the officer or person making the

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arrest may force an entrance by breaking doors or other barriers. But before breaking any door, he shall first demand entrance in a loud voice, and state that he is the bearer of a warrant of arrest; or if it is in a case in which arrest is lawful without warrant, he must substantially state that information in an audible voice." (Sec. 3731.)

The right of a policeman to arrest without a warrant is not limited to felonies, and such right has been upheld by this court in *Provisional Government v. Caecires*, 9 Haw. 523, 528, where it was held that a police officer having information which caused him to believe that a certain person had opium in his possession, contrary to law, was justified in arresting such person without a warrant. We think the facts in this case are such as to bring it fairly within the principle laid down in the case of *Smith v. Jerome*, 93 N. Y. S. 202, where the court held that "The police may search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested." The *Jerome* case was cited with approval by the circuit court for the southern district of New York, in *United States v. Wilson*, 163 Fed. 338, the court there, on page 343, referring to Mr. Justice Gaynor, the author of the opinion in the *Jerome* case, as one "who in his many decisions has held the police strictly accountable for their acts." In the case of *United States v. Mills*, 185 Fed. 318, the court says, on page 319: "From time immemorial an officer making a lawful arrest on a criminal charge has taken into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence on the trial. A blood-stained knife or garment, a half-emptied phial of poison, a mask or disguise, counterfeit coins, plates for printing counterfeit notes, gambling devices, stolen property, and many other articles are thus seized every day on the person or the premises of the alleged criminal, and no one disputes the propriety of such seizure." This same distinction between articles lawfully in the possession of a de-

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fendant at the time of his arrest and instruments or devices designed to be used in violation of law, or the possession of which is prohibited by law, is recognized in the *Weeks* case, where the court, after stating the facts, said:

"What, then, is the present case? Before answering that inquiry specifically, it may be well, by a process of exclusion, to state what it is not. It is not an assertion of the right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. * * * 1 Bishop on Criminal Procedure, §211; Wharton Crim. Plead. and Practice (8th Ed.) §60; *Dillon v. O'Brien and Davis*, 16 Cox C. C. 245. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused. The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal, holding no warrant for his arrest and none for the search of his premises."

See also *United States v. Hart*, 214 Fed. 655, 662, a recent case decided by the district court N. D. N. Y., in which the *Weeks* case was cited and distinguished; *Boyd v. United States*, 116 U. S. 616, 625; *Adams v. New York*, 192 U. S. 585; *Board of Police Commissioners v. Wagner*, 93 Md. 182; *Spalding v. Preston*, 21 Vt. 10; *State v. O'Neil*, 58 Vt. 140, 163; *Mullen & Co. v. Moseley*, 13 Idaho 457.

In the absence of any showing by the defendant that the opium pipes, the return of which is demanded, are capable of being used for any lawful purpose, and as they are plainly articles or instrumentalities impressed with the characteristics of adaptation and intended use for purposes prohibited by law, to wit, the smoking of opium, we hold that all the articles, the re-

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turn of which is demanded, should be treated as tools used for the perpetration or contemplated perpetration of crime (*United States v. Hart*, supra, 662), and that under the facts in the case the seizure thereof was not in violation of defendant's rights under the Fourth Amendment to the Constitution of the United States. The use of such articles as evidence will be determined on the trial on the facts disclosed.

For the reasons stated, the reserved question is answered in the affirmative.

J. W. Cathcart, City and County Attorney (*W. B. Lymer*, Deputy City and County Attorney, with him on the brief), for the Territory.

R. W. Breckons for defendant.

UNITED CHINESE SOCIETY, BY YONG KWONG TAT, LEE CHUCK, TOM QUAY, LOO JOE; LEE TAT YAP, LUM TAT KEUNG, YEE YAP, C. K. AI, LEE LAU, CHANG BARK SOON, LUM YIP KEE AND WONG LEONG, ITS TRUSTEES, AND YONG KWONG TAT, LOO JOE, YEE YAP, LAM YAT KEUNG AND C. K. AI *v.* YEE MUN WAI, TONG KAU, WONG HOW, PANG LUM MOW, CHU GEM, HO FON AND GOO KIM FOOK.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED JUNE 7, 1915.

DECIDED JUNE 19, 1915.

ROBERTSON, C.J., WATSON, J., AND CIRCUIT JUDGE ASHFORD
IN PLACE OF QUARLES, J., DISQUALIFIED.

CORPORATIONS—elections—right to vote.

Where, under the by-laws of an incorporated benevolent society, all members in good standing were entitled to vote at an annual

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meeting for the election of trustees, a requirement sought to be imposed by the board of trustees whereby members who could not produce a certificate of membership, or whose names did not appear upon an admittedly incomplete roll book, were required to pay the sum of two dollars in order to vote at such annual election, is illegal, and trustees elected at a meeting where such requirement was enforced and members of the society in good standing were prevented from participating, held not to have been legally elected. Where, thereafter, and on the same day, the members so excluded forced their way into the meeting place and proceeded in an orderly manner to hold a meeting and elect trustees, held that the trustees so elected became the duly elected trustees of the society.

SAME—meetings—presence of persons not members.

An election held at a meeting of an incorporated society is not invalid by reason of the presence at the meeting of persons not members, unless it be shown that they voted and that their votes were sufficient to have affected the result.

OPINION OF THE COURT BY ROBERTSON, C. J.

(Circuit Judge Ashford dissenting.)

In a petition for a writ of *quo warranto* the petitioners alleged *inter alia* that the United Chinese Society is a corporation duly chartered under the laws of this Territory, being organized for the purpose of cultivating friendly feeling among the Chinese, and acts of benevolence towards the poor and needy Chinese and those of Chinese descent residing in this Territory; that the property of the corporation is held and controlled by a board of trustees which consists of fifteen members elected for three years, five of such trustees being elected at each annual meeting of the corporation; that a membership fee of two dollars is required to be paid in advance by all persons who join the society; that assessments may be levied on the members by the board of managers for the purpose of raising funds; that every member not in arrears in the payment of assessments is entitled to one vote in the meetings of the society; that a regular annual meeting of the society was convened at its hall in Honolulu on the 29th day of November, 1913, at which more

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than one hundred members attended; that there were also present at the meeting a number of persons who were not members but who insisted on the right to vote as members; that without proceeding to the election of trustees the meeting adjourned over until the hour of noon on the 16th day of December following; that thereafter (on December 1) the board of trustees met and appointed a committee to examine the books and membership rolls of the society to ascertain who were members in good standing and entitled to vote, notice thereof by publication having been given. Those allegations were either admitted by respondents or proven by evidence in the case. It was also alleged in the petition that at the hour of noon on said 16th day of December the society met, pursuant to the adjournment, and there being many more than a quorum present, the petitioners C. K. Ai, Lam Yat Keung, Yee Yap, Loo Joe and Yong Kwong Tat were then and there regularly and duly elected trustees of the corporation; and that the respondents Yee Mun Wai, Tong Kau, Wong How and Pang Lum Mow are not trustees of the corporation, have never been elected as such, and have no right or title to the said office of trustee, but that they, and each of them, have wrongfully usurped the office, have assumed to control the property of the society, and wrongfully and unlawfully claim title to the office of trustee in the corporation and dispute the right and title of the said C. K. Ai, Lam Yat Keung, Yee Yap, Loo Joe and Yong Kwong Tat in and to the office of trustee in the corporation. No objection to the form of the petition was raised. The respondents, in their answer, in substance, alleged a conspiracy on the part of the petitioners and others who desired to control the affairs of the corporation to fraudulently control the election of trustees at the meeting of November 29, and for such purpose procured the adjournment of the meeting until December 16, and in the meantime, in furtherance of such purpose, wrongfully and unlawfully registered and issued certificates of membership in the society to such members as were

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in sympathy with them, and to none other; that in pursuance of such fraudulent design, on the morning of December 16, the petitioners, and their abettors, gathered in the hall of the society, took possession thereof, stationed themselves at the entrance thereto, and refused and prevented entrance to the hall and attendance at the meeting to such members as were not registered and who had not the certificates mentioned, and finally closed and locked the door at the entrance to the hall, and proceeded to hold the meeting and elect trustees; that the persons admitted to the meeting constituted but a small minority of the membership of the society; that admittance was denied to a larger number of members who were there present seeking admission and desirous of voting at the election for trustees of the corporation; that the members of the society who had been denied access to the hall, after waiting at the door and in the street outside, forced their way into the hall by breaking the lock of the door; that there then gathered three hundred and sixty members of the society, duly qualified to vote, who proceeded to hold a meeting at which the respondents Yee Mun Wai, Tong Kau, Wong How, Pang Lum Mow and Chu Gem were duly elected trustees of the corporation; that the society comprises nearly all the adult male Chinese residents in the Territory in its membership; that it has been the custom, never previously departed from, to keep the hall of the society open and accessible to all members from morning till evening; and that the said C. K. Ai, Lam Yat Keung, Yee Yap, Loo Joe and Yong Kwong Tat are not trustees of said society, and that the pretended election under which they claim was illegal and void. The petitioners filed a replication in which the allegations of fraud and conspiracy were denied. The facts set up in the answer were proven at the hearing substantially as alleged, and we deem it immaterial whether the action taken by the petitioners was done pursuant to a conspiracy and with evil intent or whether it was merely arbitrarily done under the belief that it was not unauthorized.

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The circuit judge held in favor of the petitioners, and a decree which declared that the five petitioning claimants are each and all duly elected trustees of said corporation and that said Yee Mun Wai, Tong Kau, Wong How and Pang Lum Mow have no right or title to said office, was entered. The respondents appealed.

Passing by some subordinate points which have been discussed in the briefs we will take up the question which involves the validity of the action taken by the board of trustees on December 1, 1913, and followed by the petitioners and their supporters at what may be designated as the first meeting of December 16 whereby the possession of a "certificate of election" was required as a condition precedent to the right to attend and vote at the meeting for the election of trustees. The society was incorporated by charter in 1884; in 1886 and again in 1900 the Chinese quarter of Honolulu was swept by fire whereby, or otherwise, many of the records of the society and the evidence of membership of many of the members were destroyed or lost; the matter of membership in the society seems to be in considerable confusion; in 1908 a new set of by-laws was adopted wherein it was provided (Art. III, Sec. 4) that "all members of this society who shall have subscribed to the by-laws and paid the initiation fee prescribed by the society before the date of the passing of these by-laws and who shall not have been expelled from the society, shall be considered members thereof without further application or the payment of a further fee; but such members shall be subject to these by-laws. Provided, however, that all persons now claiming to be members of this society shall satisfy the board of managers that they are such members." There is some doubt as to whether these by-laws became effective as they were never approved by the minister of the interior in the then government as was required by a provision in the charter, but as that provision was subsequently eliminated and as the amended by-laws, as contended by coun-

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sel for the petitioners, seem to have been regarded as in force by the society, we assume that they had become effective. The board of managers consisted of the officers of the society and forty-five other members selected annually by the trustees. That board was separate and distinct from the board of trustees. Under the by-law above quoted it would doubtless have been within the power of the board of managers to provide some reasonable scheme for the ascertainment and enrollment of the membership of the society, but there is no evidence that that body ever took any action looking toward the accomplishment of that end. There is some evidence that in 1909 the board of trustees undertook to register the members for the purposes of the election of that year, but that fact throws little or no light on the present controversy. It appears that at a meeting of the trustees held on December 1, 1913, it was decided that a register of members entitled to vote should be made up for use at the meeting to be held on December 16; the plan, as outlined in the official minutes of the trustees' meeting, was as follows: the time for registering was to be from 10 A. M. to 3 P. M. daily from December 8 to 13, "wherein all those who possess membership certificates of the society are to be requested to come to register * * * and those who have not been registered, though they possess the membership certificates, will not be entitled to vote. * * * Those who have shown their certificates of membership will be given certificates of election by the chairman of registration that they may come to vote on election day, and those who have not must pay \$2. per capita for their certificates of membership before their names can be registered and they be given certificates of election. Certificates of election can be issued to those who have lost their certificates of membership and whose names are then found in the society's membership roll." Lee Lau, one of the trustees, was appointed chairman of registration with power to select assistants for the purpose of effecting the plan, notice of which was given by publication in Chinese news-

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papers published in Honolulu. Pursuant thereto Lee Lau issued certificates of election, so called, to 148 applicants therefor upon payment of two dollars each apparently irrespective of whether the applicants claimed prior membership in the society or not. He also issued a number of such certificates to persons exhibiting certificates of membership, and in at least one instance he issued such a certificate to a member of long standing who did not show a certificate of membership but who was personally known to Lee Lau to be a member of the society. In all he registered 301 members. The claim made by the petitioners that the action taken by them on December 16, whereby admittance to the meeting was denied to those who did not have a certificate of election, is based upon the assumed validity of the requirement of registration as above explained. The circuit judge held that the whole procedure was authorized, regular and proper. In this, we think, he erred. Assuming, without deciding, that the board of trustees—as distinguished from the board of managers—had the power to provide for and require the registration or enrollment of members who desired to vote at the annual meeting by some reasonable plan or regulation, it will be seen, on examination, that the plan adopted was unreasonable, discriminatory and in violation of the by-laws. It will be observed that under that plan members in good standing and of indisputable membership were intended to be and were in fact denied admittance to the meeting unless they had procured a “certificate of election,” and in order to secure such certificate they were subjected to the payment of a tax of two dollars unless they were able to provide a certificate of membership, or their names appeared on the admittedly incomplete membership roll, or, perhaps, they happened to be personally known as members to Lee Lau, who first became a member of the society on November 28, 1913, being elected a trustee (to fill an unexpired term) at the trustees’ meeting on December 1. That was plainly in violation of the provisions of the by-laws to the effect that all members of the society in good standing at the time of the adoption of the amended by-laws

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"shall be considered members thereof without further application or payment of a further fee," and that "every member of the society who shall not be in arrears in the payment of assessments * * * shall be entitled to one vote at any annual or special meeting of the society." There was no evidence of any assessment having been levied. The right of members to vote at the meetings flowed not from the possession of a certificate of membership or from the appearance of the member's name upon a roll book of more or less recent compilation, but from the fact of membership in the society. Under the by-laws all members in good standing could insist upon this right "without further application or the payment of a further fee," and the exercise of the right, though subject to regulation by reasonable by-laws, was not to be abridged as to any of such members in the manner attempted and sought to be justified by the petitioners.

We hold that the purported election of the petitioning claimants was illegal and void, and that those persons are not trustees of the corporation.

Counsel for the respondents contend that as the alleged title of the petitioning claimants was set up in the petition and denied in the answer, it became a material issue in the case, the burden of proof as to which was upon the petitioners, and that as the petitioners failed to sustain the averment the court should order the dismissal of the writ without inquiring into the validity of the title of the respondents upon the principle that a petitioner without good title may not recover because of infirmities in the respondent's title. See 32 Cyc. 1460; 17 Enc. Pl. & Pr. 463, 471. In *Canario v. Serrao*, 11 Haw. 22, where it was found that the respondents were without title, the court ordered a new election though the petitioners, likewise, were without title. But the point urged here seems not to have been raised in that case. However, we deem it unnecessary to pass upon the point, preferring to rest our decision on the merits of the claim of the respondents.

Counsel for the petitioners contend that the second meeting

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of December 16—the one at which the four above named respondents claim to have been elected as trustees—was not a legal meeting and that the election held thereat was a nullity. The reasons assigned for this are that the meeting place was broken into by force; that none of the officers of the society were present; that the records of the society were not there; and that many of the persons present were not members. The contention is not sustained. The time for the meeting had been fixed at twelve o'clock, noon, of the day in question; the respondents and their supporters desired and attempted to attend at the hour stated but were wrongfully excluded from the meeting by the petitioners and their supporters; the respondents and others entered the hall as soon as was practicable under the circumstances, convened the meeting and proceeded in an orderly manner with the election of trustees; that the petitioners and their friends, including the officers of the society, declined to attend and take part in the meeting was not the fault of the respondents, they were not prevented from taking part. Anything that may have savored of irregularity was traceable to the prior arbitrary action of the petitioners, and they are not now in a position to complain of it. That some persons were present at the meeting who were not members of the society should not be held to invalidate the election of the respondents in view of the fact that they were chosen by the unanimous vote of the members present and it not appearing that the presence of strangers in any manner affected the result. "The proceedings at a meeting are not invalid by reason of the presence of persons not stockholders or members, unless it is shown that they voted, and that their votes were necessary to carry the resolution complained of." 3 Clark & Marshall, *Private Corporations*, p. 1976, citing *Madison Av. Bap. Ch. v. Bap. Ch. in Oliver St.*, 2 Abb. Pr. (N. S.) 254. See also *McNeely v. Woodruff*, 13 N. J. L. 352; and *Wardens of Christ Ch. v. Pope*, 8 Gray 140, 146, where the court said, "Some objection was suggested to the legality of the election

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of those persons upon the ground that illegal votes were received. But there is nothing in the case to show that they affected the result, or that a majority of votes were not cast for those persons without counting such supposed illegal votes." In view of all the circumstances we hold that the respondents Yee Mun Wai, Tong Kau, Wong How and Pang Lum Mow were duly elected as trustees of the society.

The decree appealed from is vacated and set aside, and the case is remanded to the circuit judge with direction to enter a judgment dismissing the writ.

Lorrin Andrews and *R. W. Breckons* for petitioners.

F. W. Milverton (*Thompson & Milverton* on the brief) for respondents.

DISSENTING OPINION OF CIRCUIT JUDGE ASHFORD.

I respectfully dissent from the conclusion that the respondents Yee Mun Wai, Tong Kau, Wong How and Pang Lum Mow were legally elected as trustees of the United Chinese Society, at the so called second meeting of December 16, 1913. I cannot persuade myself that the mob which then gathered in the hall of the society, after breaking open the front door with a sledge hammer, constituted, in any just or legal sense, a meeting of the society, authorized to proceed with the election of trustees. For some time before the first meeting convened, at noon, and while that meeting was in progress, those who later broke into and took possession of the hall constituted a disorderly mob, for whose control it became necessary to call in police assistance. There is no plausible claim, even on the part of respondents, that the mob in question was composed, to any considerable extent, of *bona fide* members of the society. The locking of the front door at intervals prior to twelve o'clock noon, was manifestly a prudential course, adopted in order to prevent the mob in question from "rushing" the hall, and illegally capturing the meeting.

It may be conceded that the measures taken by order of the board of trustees, to secure a registration of the membership,

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were unreasonably restrictive and discriminatory, even to the extent of invalidating the election of the petitioning claimants, without, by any means, establishing the legality of the pretended "election," held after the mob had broken into the society hall, and proceeded to organize a meeting. But I do not feel that the official title of the petitioning claimants is here involved, and for that reason am willing that so much of the decree of the trial judge as purports to declare their right to office should be reversed. In my opinion, the remainder of the decree should be affirmed.

Other reasons, in great variety, and founded upon the various elements of the controversy, might be adduced in support of my position herein,—but I am no very ardent champion of the utility of dissenting opinions—hence I content myself with the foregoing brief expression of my dissent in the present case.

TERRITORY OF HAWAII v. CHISI NISHIMURA.

APPEAL FROM DISTRICT MAGISTRATE OF MAKAWAO.

SUBMITTED JUNE 7, 1915.

DECIDED JUNE 19, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CRIMINAL LAW—jurisdiction—district magistrate—jury trial.

A defendant was charged before a district magistrate with the offense of selling liquor without a license, appeared and demanded a trial by jury; the district magistrate granted the demand; the prosecution refused to introduce any evidence; the defendant moved for her discharge, which motion was denied, and she was committed to answer to the circuit court: Held, the district magistrate had no jurisdiction to commit the defendant for trial to the circuit court in the absence of evidence tending to show the commission of the offense and the probability of defendant's guilt, and that defendant was entitled to her discharge.

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OPINION OF THE COURT BY QUARLES, J.

The appellant, hereinafter called the defendant, was charged in the district court of Makawao on the 23rd day of April, 1915, with the offense of selling, disposing of and furnishing to another intoxicating liquor without a license so to do, she not being the agent or employee of a licensee to sell intoxicating liquor, in violation of section 2155 R. L. 1915. The defendant appeared and demanded a trial by jury, whereupon the assistant county attorney took the position before the district magistrate that the demand for a jury trial ousted the district magistrate of jurisdiction. Counsel for defendant there and then moved that the prosecution introduce the evidence against the defendant. The district magistrate overruled the said motion and the prosecution declined to introduce any evidence, whereupon counsel for the defendant moved that the defendant be discharged; which motion the district magistrate also overruled. The district magistrate then made an order granting "the demand of the defendant for a trial by jury, to the circuit court of the second judicial circuit." The defendant has appealed to this court on points of law, perfecting her appeal within the time required by law. The points of law stated in the certificate of appeal are as follows: "First—that the court erred in holding the defendant for trial after the prosecution refused to put any evidence on. Second—that the court erred in refusing to discharge the defendant for the reason that there was no evidence in the case on which to hold the defendant." Section 2299 R. L. 1915 is as follows:

"District magistrates shall have jurisdiction of, and their criminal jurisdiction is hereby limited to, criminal offenses punishable by fine, or by imprisonment not exceeding one year whether with or without hard labor or with or without fine. Provided, however, that they shall not have jurisdiction over any offense for which the accused cannot be held to answer unless on a presentment or indictment of a grand jury; and, provided, further, that in any case cognizable by a district magistrate as aforesaid in which the accused shall have the right to a trial

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by jury in the first instance, the district magistrate, upon demand by the accused for such trial by jury, shall not exercise jurisdiction over such case, but shall examine and discharge or commit for trial the accused as provided by law, but if in any such case the accused shall not demand a trial by jury in the first instance, the district magistrate may exercise jurisdiction over the same subject to the right of appeal as provided by law."

The punishment for the offense charged, provided by section 2155 R. L. 1915, is a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment not more than twelve months, or both.

By the provisions of section 2299, above quoted, if the defendant was entitled to a trial by jury in the first instance, then her demand for a jury trial ousted the district magistrate of jurisdiction to try the case upon its merits. Under the express provisions of the second proviso in said statute, the demand for a jury trial having been made, it became the duty of the district magistrate to examine into the charge against the defendant by hearing the evidence for and on behalf of the prosecution and then to discharge the defendant or commit her for trial to the circuit court. The prosecution refusing to introduce any evidence against the defendant she was there and then entitled to her discharge if she was entitled to a trial by jury in the first instance. In section 83 of the Organic Act creating the Territory of Hawaii Congress has prescribed the qualifications of grand and petit jurors, and among other things has expressly provided: "No person shall be convicted in any criminal case except by unanimous verdict of the jury." "The words 'criminal case' apply to proceedings in a court against an accused person charged with doing something forbidden, who, if found guilty, is punished" (*United States v. Dunne*, 173 Fed. 254, 257).

It will be seen by section 2299, *supra*, that the jurisdiction of district magistrates in criminal cases is limited to those cases in which the defendant by failing to demand a jury trial,—in cases where the defendant is entitled to a jury trial in the first instance,—is deemed to have waived the same and that when

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such demand for a jury trial is made by a defendant the district magistrate must then hold an examination, inquire into the charge against the defendant, and discharge him, unless the evidence is sufficient to show probable guilt, in which case he is to be committed for trial to the circuit court of the circuit. The offense charged in this case is one over which the circuit courts could exercise jurisdiction in the first instance under the provisions of chapter 215 R. L. 1915.

The right of trial by jury is a common law right, of which it is said in Blackstone, Book 4, p. 349: "The antiquity and excellence of this trial for the settlement of civil property has before been explained at large. And it will hold much stronger in criminal cases; since in times of difficulty and danger, more is to be apprehended from the violations and partiality of judges appointed by the Crown, in suits between the King and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the Crown. * * * But the founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the King for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury, and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion."

Section 1 R. L. adopts the common law of England, except as to criminal offenses and certain other exceptions, but the common law right of trial by jury in criminal cases is thereby recognized in this jurisdiction, as well as in section 83 of the Organic Act, above cited. The charge against the defendant was one in which she was entitled to a jury trial in the first instance, and when she demanded a jury trial it became the duty of the

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prosecution to introduce evidence tending to show the commission of the offense and the probability of the defendant having committed the same. *Ex parte Higashi*, 17 Haw. 428, 443. The prosecution failing to introduce any evidence against the defendant, it was error on the part of the district magistrate to deny the motion of the defendant for her discharge, and he had no jurisdiction to hold her to answer to the circuit court, unless the defendant waived an examination upon the charge, without holding such examination.

The appeal of the defendant is sustained on both points of law and the case is remanded to the district court of Makawao with instructions to discharge the defendant.

No appearance for the Territory.

E. Murphy for defendant.

TERRITORY OF HAWAII v. JOHN T. SCULLY, WILL-
MOT R. CHILTON AND JOHN H. FISCHER.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED MAY 21, 1915.

DECIDED JUNE 22, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

INDICTMENT—*demurrer*—*obstructing the course of justice*.

An indictment which charges the defendants in one count with having unlawfully, maliciously and fraudulently combined and mutually undertaken and concerted together to obstruct the course of justice by giving to a witness a sum of money to evade giving his testimony in a civil proceeding before the board of license commissioners on a hearing of an application for a license to sell intoxicating liquors; in another count with having unlawfully, maliciously and fraudulently concerted together and did suppress the evidence of a certain witness in such proceeding; in another count with having wilfully intended to prevent and obstruct the course

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of justice, wrongfully, unlawfully and wilfully, evaded, hindered and prevented the said witness from appearing before said board to give his evidence, and did there and then and thereby suppress the evidence of said witness in such proceeding, is good as against a demurrer on the ground of insufficiency, and such demurrer should be overruled.

SAME—*motion to quash—irregularity in making grand jury list.*

A motion to quash an indictment on the ground of irregularities in selecting the list of persons to act as grand jurors should be overruled, as challenges to the panel, and to individual jurors, can only be made by the prosecuting officer, or by some person held to answer a criminal charge, and must be made before the grand jury is sworn.

STATUTES—*construction—penal statute.*

Penal statutes should be construed liberally in favor of the accused and should not be extended in terms by construction; but, the object and purpose of such statutes should not be defeated by refusing to give to the language used its obvious and usual signification.

SAME—*same—words and phrases—civil proceeding.*

In construing a statute which makes it an offense "to obstruct the course of justice * * * in any suit or proceeding, criminal or civil," the word "proceeding" must be considered as having been used in a broad sense, and not in a restricted one; and, so considered, an application pending before a board of license commissioners for renewal of a license to sell intoxicating liquors is a civil proceeding.

SAME—*same—referring to common law for meaning of statute.*

Where a statute punishes an act which was a criminal offense at common law, and the statute defines the act in general terms, resort may be had to the common law to ascertain the meaning of the statute.

OPINION OF THE COURT BY QUARLES, J.

(Watson, J., dissenting in part.)

October 14, 1914, the grand jury of the first judicial circuit returned an indictment against the defendants John T. Scully, Willmot R. Chilton and John H. Fischer containing three counts, the facts set forth in each count alleged to have been committed on the 29th day of June, 1914. The first count accused the said defendants of having "unlawfully, maliciously and fraudulently combined and mutually undertook and con-

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certed together, to commit an offense against the laws of the Territory of Hawaii, to wit, to suppress legal evidence, * * * then and there, wilfully intending to prevent and obstruct the course of justice, did give to the said John H. Fischer the sum of Twenty Dollars, lawful money of the United States of America, to evade the giving of his testimony before the Board of License Commissioners of the City and County of Honolulu, Territory of Hawaii, in the matter of the application of the Waikiki Inn, Limited, a corporation, for a renewal of its Second Class Liquor License, then and there pending before said Board of License Commissioners, the same being a civil proceeding authorized by law, and the said Board of License Commissioners being then and there a Board duly created and existing by virtue of the laws of the Territory of Hawaii, and authorized and directed to hear the same, and the said John H. Fischer, being then and there a witness competent and necessary to be heard in said proceeding and his testimony necessary and material to the issue there presented in the matter so pending as aforesaid, as said John T. Scully, Willmot R. Chilton and John H. Fischer and each of them then and there well knew, and the said John T. Scully, Willmot R. Chilton and John H. Fischer did then and there and thereby commit the crime of conspiracy in the first degree, contrary to the form of the statute in such case made and provided."

The second count, after setting out the facts aforesaid, charged the said defendants with "unlawfully, maliciously and mutually undertaking and concerting together, suppressed the legal evidence of said John H. Fischer in the civil proceeding aforesaid, and wrongfully and unlawfully prevented the said John H. Fischer from appearing before the said Board of License Commissioners to give legal evidence in the civil proceeding then pending as aforesaid, and did then and there and thereby commit the crime of conspiracy in the first degree, contrary to the form of the statute in such case made and provided."

The third count, after setting forth the facts and circum-

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stances alleged in the first count, charged the said defendants, by said acts, with "then and there wilfully intending to prevent and obstruct the course of justice, wrongfully, unlawfully and wilfully, evaded, hindered and prevented the said John H. Fischer from appearing before the said Board of License Commissioners to give his legal evidence in the civil proceeding so pending as aforesaid, and did then and there and thereby suppress the legal evidence of the said John H. Fischer in the civil proceeding of the application of the Waikiki Inn, Limited, a corporation, for the renewal of its Second Class Liquor License then and there pending and to be heard before the Board of License Commissioners of the City and County of Honolulu, Territory of Hawaii, as hereinafter set forth, contrary to the form of the statute in such case made and provided."

To the said indictment the defendant Scully appeared and filed his written motion to quash the said indictment upon the ground that "the grand jury which found said indictment was not drawn from a certified list of names which had been selected in the manner in which it is provided in section 3 of Act 74 of the Laws of the Territory of Hawaii for the Session of 1905, amending section 1777 of the Revised Laws of Hawaii;" that the jury commissioners, in selecting the list of names from which said grand jury were drawn, did so without regard to the number of registered voters last registered in each of the several precincts of the circuit, selecting the names upon said list from the several precincts in the said circuit as follows: from precinct 1 of the fourth district, having a registered vote of 393, eleven names; from precinct 2 of the said district, having a registered vote of 381, seven names; from precinct 3 of said district, having a registered vote of 342, fourteen names; from precinct 4 of said district, having a registered vote of 364, fifteen names; from precinct 5 of said district, having a registered vote of 341, seven names; from precinct 6 of said district, having a registered vote of 450, one name; from precinct 7 of said district, having a registered vote of 320, two names; from pre-

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cinct 8 of said district, having a registered vote of 399, one name; from precinct 9 of said district, having a registered vote of 467, one name; from precinct 10 of said district, having a registered vote of 155, four names; from precinct 11 of said district, having a registered vote of 48, one name; from precinct 12 of said district, having a registered vote of 339, one name; from precinct 8 of the fifth district, having a registered vote of 257, two names; from precinct 10 of said district, having a registered vote of 303, one name; from precinct 12 of said district, having a registered vote of 147, one name; from precinct 13 of said district, having a registered vote of 335, five names; from precinct 16 of said district, having a registered vote of 86, one name. And that no names whatever were placed on the grand jury list by the jury commissioners in the following precincts in said fifth district, having registered votes as follows: precinct 1, registered vote 114; precinct 2, registered vote 113; precinct 3, registered vote 97; precinct 4, registered vote 138; precinct 5, registered vote 213; precinct 6, registered vote 133; precinct 7, registered vote 126; precinct 9, registered vote 508; precinct 11, registered vote 504; precinct 14, registered vote 497; precinct 15, registered vote 260; precinct 17, registered vote 107.

In support of said motion to quash the defendants filed a statement of said motion verified by defendant Scully, the affidavit of A. S. Humphreys, the affidavit of D. Kalauokalani, Jr., clerk of the city and county of Honolulu, verifying the statement showing the registered voters in each of the precincts in the first judicial circuit and the number of grand jurors drawn from each, where any were drawn, and a duly certified copy of the list of grand jurors made by the jury commissioners of the first judicial circuit on the 1st day of December, 1913, for use during the year 1914 in the said circuit.

To the said indictment and to each count thereof the defendant Chilton filed his certain demurrer upon a number of grounds specified, but which may be summarized as follows: 1. The

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said indictment and the first, second and third counts thereof, neither severally nor as a whole, state facts sufficient to constitute any crime or offense against the laws of the Territory of Hawaii. 2. That the said indictment and the said counts thereof, nor either of them, do not allege facts constituting a cause of action upon the ground (a) "That the Board of License Commissioners of the City and County of Honolulu is not a court, tribunal, board or commission to which has been delegated by the Territory of Hawaii or the United States of America, power and or authority to administer justice; (b) That the wilful and or intentional prevention and or obstruction of proceeding before the Board of License Commissioners of the City and County of Honolulu is not and does not constitute a wilful and or intentional prevention and or obstruction of the course of justice; (c) That the Board of License Commissioners of the City and County of Honolulu is not authorized by law to hear and or receive testimony and or hear or accept depositions and or other legal evidence; (d) That the application for the renewal of a license and or the hearing upon the application for renewal of a license before the Board of License Commissioners of the City and County of Honolulu is not a suit and or proceeding criminal and or civil."

To the motion to quash the said indictment the city and county attorney entered a demurrer *ore tenus* in open court, and the first judge of the first circuit reserved to this court the question "shall said demurrer be sustained." Said judge also reserved to this court, touching said demurrer to the indictment, the question "whether said demurrer should be sustained for any reason or reasons therein set forth, or whether it should be overruled."

We will first consider the demurrer to the said indictment. The defendant contends that reading sections 4039 and 4041 R. L. 1915 together, that it is apparent that section 4039 was intended to relate to suits and proceedings in a court, while section 4041 was intended to relate to all obstructions of public

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legislation and obstruction of the due administration of the law. The last named section reads as follows: "Whoever wilfully obstructs or attempts to obstruct the public legislation, or the due administration of the law, by threats of violence against, or intimidation of, or endeavoring to intimidate, any member of the legislature, or any legislative, judicial, executive or other officer charged with any duty in the administration, enforcement or execution of the law, shall be punished by imprisonment not more than one year, or by fine not exceeding five hundred dollars." A careful reading of both sections shows that the legislature intended to prevent obstructions of public justice by the suppression of evidence by the provisions of section 4039, while by the provisions of section 4041 it intended to prevent the obstruction of public legislation, and the due administration of the law, by the intimidation of public officials. The latter section has no application to the case at bar, and there is nothing in its provisions showing an intent to limit the provisions of section 4039 to the suppression of evidence in suits or proceedings pending in a court or judicial tribunal strictly. Section 4039, which has been in force for many years past, is as follows: "Whoever, wilfully intending to prevent or obstruct the course of justice, shall give any gratuity or reward, or make any promise thereof, express or implied, that any one shall evade giving his testimony, or shall destroy, conceal or suppress any deposition or other legal evidence in any suit or proceeding, criminal or civil, shall be punished by imprisonment at hard labor not more than one year, or by fine not exceeding five hundred dollars."

Section 4076 R. L. 1915, which has been in force for many years, provides as follows: "A conspiracy is a malicious or fraudulent combination or mutual undertaking or concerting together of two or more, to commit any offense or instigate any one thereto, or charge any one therewith." And said section, in enumerating specific acts that under the statute constitute conspiracy, mentions the following: "A confederacy to commit

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murder * * * or any other offense provided for in the criminal code."

The principal question involved in the decision of the reserved question, touching the demurrer to the indictment, is, whether under the statute (Sec. 4039 R. L. 1915) an application before the board of license commissioners for the renewal of a liquor license is a civil proceeding. If this question be answered in the affirmative, it necessarily follows that the acts charged in the indictment are a violation of the statute, in that a witness was promised and given a reward to evade giving his testimony in a civil proceeding, thereby obstructing the course of public justice.

We are not unmindful of the rule recognized in this jurisdiction, as in others, that penal statutes are to be liberally construed in favor of the accused; that statutes creating and defining crimes cannot be extended by intendment; and, no act can be punished as a crime unless clearly within the terms of a statute forbidding it and prescribing a punishment therefor. *Territory v. Ah Goon*, ante 31, 33. On the other hand, the object, purpose and intent of a penal statute should not be defeated by technicalities, or by refusing to give to the language its obvious and usual signification. Legally, the acts charged in the indictment are either innocent or criminal. The suppression of evidence for the purpose of working a fraud upon the public, or upon the people of a certain vicinity, as well as upon an administrative board charged with and exercising quasi judicial powers, tends to pervert the course of public justice and palpably comes within the spirit of the statute under consideration. Does it come within the letter of the statute? This court has held that a board of license commissioners is not a court. *Territory v. Miguel*, 18 Haw. 402. Nevertheless, the board is charged with the duty of hearing applications; with the power to grant or refuse a license to sell intoxicating liquors, or a renewal of such license; is authorized to hear remonstrances to such applications, and is prohibited from granting a license to

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any one who has been convicted of a felony under the laws of the Territory, or to any one who is under majority, or to any one who has had a license and the same has been revoked for cause under the statute authorizing revocation. The board is also prohibited by law from issuing a license for the sale of intoxicating liquors in any building or premises within 150 feet of any church, chapel or school. An application for a license or renewal of a license comes before the board for hearing and determination. The board is authorized by section 2123 R. L. 1915, to hear the protest of any registered voter of the precinct within which the business is to be conducted under the license, or the protest of any one owning real estate within 1000 feet of the premises, or the protest of any person or persons on behalf or in the interest of any church, chapel or school situated within the distance restricted by statute in favor of such institutions. Section 2104 R. L. 1915, authorizes every member of the board of license commissioners to administer oaths in all matters pertinent to the business of the board. It is true that under the statute governing the board of license commissioners they have a very broad discretion in regard to granting or refusing licenses and it may be said that there is no positive duty enjoined upon them in any case to grant a license; and, that their action in passing upon an application for license, or a renewal of the license, is final. Under such circumstances, is the hearing before the board of license commissioners, provided for by the statutes relating thereto, a proceeding within the meaning of the statute under consideration? It is not a criminal proceeding, and if a proceeding at all it must be a civil proceeding. The phrase "in a suit or proceeding, criminal or civil," must be considered as having been used, not in a technical or limited sense, but, in a broad and general sense, giving to each of the words its ordinary and general signification. The word "court" is used in similar phrases in many statutes, and if the word had been used here so as to make the phrase read "in any suit or proceeding in a court" the statute would not apply to a pro-

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ceeding before the board of license commissioners. In *Maloney v. Douglas Co.*, 89 N. W. 249, the supreme court of Nebraska held that presenting a claim against the county before the county board was a proceeding, saying: "The phrase 'action or proceeding' in which the lien is given is certainly broad enough to include the prosecution of a claim before a county board." In *Raymond v. Cleveland*, 42 Ohio St. 522, the term "proceeding" was held to be broad enough to include a special assessment for street purposes and not confined in its meaning to an action, or steps in an action, in a court. It has been repeatedly held in Indiana that an application to a board of county commissioners for a license to sell intoxicating liquors is a judicial proceeding; that the petitioner has the burden of proving that he is of sober habits and is otherwise under the law a fit person to be entrusted with a license to sell intoxicating liquors. *Halloran v. McCullough*, 68 Ind. 179; *List v. Padgett*, 96 Ind. 126; *Castle v. Bell*, 145 Ind. 8; *Scanlon v. Deuel*, 176 Ind. 208. It has been held in Missouri that the incorporation of a drainage district, and the application of a person for a license to sell liquor, as a dram shop keeper, are proceedings or suits within the meaning of a statute giving the right to a change of venue under certain circumstances "in any civil suit." *State ex rel. v. Riley*, 203 Mo. 175; *State ex rel. v. Denton*, 128 Mo. App. 304, 312. In *Tuohy v. Halsell*, 35 Okl. 61, it was held that a hearing before a committee of the senate to determine the fitness of an appointee, whose confirmation was pending before the senate, was "a proceeding authorized by law and in and to a body clothed with quasi judicial powers, sitting in execution of a public duty." In *re Tillery*, 43 Kans. 188, in construing a statutory provision that the repeal of a statute does not affect any proceeding commenced under or by virtue of the statute repealed, the court, at page 192, said: "It would seem that the word 'proceeding' as used in the statute * * * is broad enough to include any proceeding of a judicial or official character. It would seem that it should include the proceedings of any

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court, or any official board, or any officer, and there is some room for a claim that it might include still other proceedings." In *U. S. v. New Departure Co.*, 195 Fed. 778, it is held that a hearing before a grand jury is a proceeding within the meaning and intent of the phrase "any suit or proceeding" as used in the federal judicial code, the word "proceeding" to be understood in its ordinary signification. In *Ruhland v. Cole*, 143 Wis. 367, 376, it is said: "The proceeding for revocation of a license before a city council is a proceeding in which the public is interested, and the intimidation of witnesses called or to be called in behalf of the public, under the common law rule above quoted, applied to present conditions, is a misdemeanor." The rule referred to in said quotation was stated by the Wisconsin court as follows: "'The doing of any act tending to obstruct the due course of public justice has always been held indictable as a misdemeanor at common law. Bribing, intimidating, or persuading a witness not to testify, or not to attend court, are each among the readiest and the most corrupting of this class of misdemeanors.' *State v. Keyes*, 8 Vt. 57, 67, 30 Am. Dec. 450; *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66; 10 Am. & Eng. Ency. of Law (2d ed.) 1041 and authorities in note. This rule of the common law was announced originally with reference to intimidating or bribing witnesses called or to be called by the state in a criminal prosecution. But it was the public nature of the prosecution and not the nature of the act prosecuted that gave rise to the rule, and the rule has been extended in England to special proceedings relating to the collection of revenue. *State v. Keyes*, supra." (*Ruhland v. Cole*, supra.)

We hold that the legislature used the word "proceeding" in its broad sense and not in a limited or technical sense. The hearing of an application for a liquor license by the board of license commissioners is a proceeding of a quasi judicial nature in which the public is interested; in which the applicant for a license is interested; in which any person authorized by law to file a protest is interested. The hearing is a public hearing;

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issues of fact are presented to be determined by the board upon evidence introduced. It would be an obstruction of the course of public justice to allow either side to such a controversy before the board of license commissioners to intimidate or bribe witnesses from appearing, and the suppression of legitimate evidence by any party interested in such controversy would be detrimental to the public good, to the best interest of society, and a culpable obstruction of the course of public justice. At common law it has always been an offense to pervert or obstruct public justice or to conspire for such purpose. *State v. DeWitt*, 2 Hill (S. C.) 282, 27 Am. Dec. 371. "All conspiracies which have for their object the perversion or obstruction of public justice have been, from the earliest times, regarded as indictable. Accordingly, it has been held to be an indictable conspiracy when the design of the confederates was to be accomplished by the suppression or fabrication of evidence." 6 Am. & Eng. Ency. L. (2 ed.) 856, 857. See also *State v. Carpenter*, 20 Vt. 9. While we have no common law offenses in this jurisdiction, yet the rule is well established that when a statute punishes some act which was a crime at common law, and the statute defines the act in general terms, resort may be had to the common law to ascertain the meaning of the statute. *State v. Berdetta*, 73 Ind. 185; *State v. Bertheol*, 6 Blackf. 474; *Conner v. Commonwealth*, 13 Bush 714; *Benson v. State*, 5 Minn. 6; *State v. Davis*, 22 La. Ann. 77; *Prindle v. State*, 31 Tex. Cr. 551; *Commonwealth v. Chapman*, 13 Metc. (Mass.) 68; *State v. Camley*, 67 Vt. 322; *In re Greene* 52 Fed. 104, 111; *State v. Noble*, 118 Ind. 350. In the case of *The King v. Angee*, 8 Haw. 259, the court, at page 260, said: "The defendants' argument, that because we have no common law offenses we are therefore precluded from the use in our practice of any common law definitions which go to make up the description of a criminal offense, is untenable. Many words are necessarily used in defining crimes which are of a technical character, with meanings derived sometimes from usage, sometimes from the common law,

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and sometimes from judicial decisions. The contention that we must go to our statutes for the definitions of all words which themselves are used in defining crimes is simply impracticable." Judge Cooley, in his work on constitutional limitations (7 ed.), at page 94, says: "It is also a very reasonable rule that a State constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that for its definitions we are to draw from that great fountain, and that in judging what it means, we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of a well understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." The word "justice" has been defined as follows: "The constant and perpetual disposition to render every man his due." Justinian Inst. b. 1, Tit. 1; Coke, 2nd Inst. 56. "The conformity of our actions and our will to the law." Toul-lier, Droit Civ. Fr. Tit. Prel. n. 5. It is again defined as "The dictate of right according to the common consent of mankind generally or of the portion associated in one government or governed by the same principles and morals." Anderson's Law Dict. And again: "In a judicial sense, * * * exacting conformity to some obligatory law." See decision in *Borden v. State*, 11 Ark. 519, where the court, at page 528, quotes from Burlamqui. Can it be doubted that in a public hearing, before a board, in a matter of public concern which affects public and private interests—where the question of applying and administering the public laws is involved—where issues of fact are made by application of an interested party on the one hand, and protests by public officers or private parties interested on the other—where evidence is admissible, and each member of the

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public board is clothed by law with the power to administer oaths to witnesses, that the prevention of the attendance of a witness by either of the means mentioned in the statute is an obstruction of the course of public justice in a civil proceeding? As shown by the authorities heretofore cited the important feature in the offense of obstructing the course of public justice at common law was the public nature of the proceeding, and not the nature of the subject matter of the proceeding. It is not necessary to the offense that the witness should have been subpoenaed. *State v. Horner* (Del.); 26 Atl. 73; *State v. Bringgold*, 40 Wash. 12; *Commonwealth v. Berry* (Ky.) 133 S. W. 212; *State v. Sills* (Kans.) 118 Pac. 867. In *Commonwealth v. Berry*, supra, the court said: "The course of public justice must not be impeded. The gist of the offense is not a contempt of the court, or an abuse of its process, but the obstruction of justice. * * * The law does not tolerate that its proceedings shall be stifled, and the running off of a witness to stifle a prosecution is none-the-less an offense because it is done before the grand jury is impaneled."

We hold under the statute in question that the acts set forth in the indictment are sufficient to state an offense in that the acts charged show that the defendants, concerting together, mutually undertook to promise, and to give a gratuity or reward to a witness to evade giving his testimony in a civil proceeding.

As to the motion to quash the indictment we find no showing in the record of any claim that the grand jurors, or any of them, who found and returned the indictment, were disqualified or incompetent to act as such jurors. The motion is based upon an obvious irregularity in disregarding the plain provisions of the statute (Sec. 2412 R. L. 1915) in failing to make the list from which the grand jurors are to be drawn as directed by the statute, and did not "proceed to select and list from the citizens, voters and residents of the several precincts in the circuit, as near as may be according to and in proportion with the respective number of registered voters last registered in each of such

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precincts" the list of grand jurors. Section 2422 R. L. 1915, provides: "Before the grand jury is sworn, the prosecuting officer, or any person held to answer a charge for a criminal offense may challenge the panel, or an individual juror, for cause to be assigned to the court." This statute was enacted in 1903, and its provisions were in force prior thereto by rule adopted by this court. In *Territory v. Ferris*, 15 Haw. 139, it was held that this right to challenge the panel or individual jurors must be exercised before the jury is sworn, and if no challenge to the panel or individual jurors is made before they are sworn, the right to challenge is waived. In that case Ferris was in jail, held to answer any indictment that might be found against him, and was not brought into court, and did not demand the right to be present in court when the grand jury was impaneled, and this court said that it was his duty to know when the court met, and to give notice or demand the right to be present in order to exercise his right of challenge, failing which, he waived the right. As to the defendant, he does not belong to any class of persons who are authorized by the statute to challenge the panel. The terms of the statute, the reasoning in the *Ferris* case, and in the decisions cited in the *Ferris* case, impel us to hold that the motion to quash the indictment upon the grounds stated, was made too late, and cannot be properly made after an indictment has been returned on the mere ground of irregularity. The reasoning in the case of *Territory v. Chung Nung*, 21 Haw. 66, is in harmony with these views.

We answer the reserved questions as follows: The demurrer to the indictment should be overruled. The demurrer to the motion to quash should be sustained, and the motion to quash overruled.

J. W. Cathcart, City and County Attorney (W. B. Lymer, Deputy City and County Attorney, on the brief) for the Territory.

R. J. O'Brien (E. C. Peters with him on the brief) for defendant Willmot R. Chilton.

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OPINION OF WATSON, J., CONCURRING IN PART AND
DISSENTING IN PART.

I concur in the conclusion arrived at by the majority that the motion to quash should be overruled, but I respectfully dissent from the views expressed in the foregoing opinion touching the disposition of the demurrer to the indictment and the conclusion arrived at in that behalf. I am unable to agree that an application for the renewal of a liquor license before the board of license commissioners is a civil "proceeding" within the meaning of section 4039 of the Revised Laws of 1915, which section the defendants are charged with having violated and conspired to violate. To constitute an offense under the section referred to which is set out in full in the foregoing opinion, it is necessary that there be a wilful intent to "prevent or obstruct the course of justice" in a "suit or proceeding, criminal or civil."

That the application for the issuance of a liquor license before the board of license commissioners is not a suit is obvious, the word "suit" being defined by Anderson as follows: "Any proceeding in a court in which a plaintiff pursues his remedy to recover a right or claim;" and by Bouvier: "Suit is a generic term of comprehensive signification and applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him for the redress of an injury and the recovery of a right." That the application for the renewal of a license is not a criminal proceeding is recognized by the opinion of the court.

The question as to whether or not an application before a board of license commissioners is a civil proceeding within the meaning of our statute depends upon the meaning of the word "proceeding." In the foregoing opinion a number of cases are cited (none of which, it may be observed, involve the construction of a penal statute) from which the majority deduce that the word "proceeding," as used in our statute, is broad enough to cover the case made by the indictment. In *Hopewell v. State*,

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22 Ind. App. 489, 495, a case where a police officer was indicted for failing to arrest and disperse a riotous mob, and it was argued by the State that the indictment was based upon a statute which made it a criminal offense for "the county clerk, sheriff, constable, coroner or other ministerial officer" to neglect or refuse to perform any duty he is required by law to perform in any criminal case or *proceeding*, the court, after citing a number of cases in which the word "proceeding" has been judicially defined, says: "In the above cases it will be seen that the term 'proceedings' is used with reference to something done or to be done in a court of justice. Not only do we believe this to be the proper interpretation and meaning of the term, but from the wording of the statute itself we can but conclude that it was intended by the legislature to be given this meaning." In *Nelson v. Dunn*, a late case decided by the appellate court of Indiana, and reported in 104 N. E. 45, the court, on page 46, says: "It is to judicial acts before some judicial tribunal that the term 'proceeding' may be properly applied in a legal sense." In *Gordon v. State ex rel.*, 4 Kan. 421, 432, it is said: "The term 'proceeding' is a technical one, and has acquired a peculiar and appropriate meaning in law. In its general sense, in law parlance, it means all the steps or measures adopted in the prosecution or defense of an action." See also 23 Am. & Eng. Enc. L. 2 ed. 155.

I am clearly of the opinion that the word "proceeding," as used in our statute, was intended by the legislature to have reference to something done or to be done in a court of justice. (That a board of liquor commissioners is not a court was decided by this court in *Territory v. Miguel*, 18 Haw. 402, cited in the foregoing opinion.) This view is strengthened by a consideration of the wording of the statute itself which makes the intent (to prevent or obstruct the course of justice) an essential element of the offense created. In 29 Cyc. 1326, it is said: "The phrase 'obstructing justice' means impeding or obstructing those who seek justice in a court or those who have duties or powers

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of administering justice therein." One of the definitions given by Bouvier of the word "justice" is: "According to the Frederician code, part 1, book 1, title 2, Sec. 27, justice consists simply in letting every one enjoy the rights which he has acquired in virtue of the laws, and as this definition includes all the other rules of right there is properly but one single general rule of right, namely, give every one his own." One of the several definitions given by Anderson, for which he cites *Borden v. State*, 11 Ark. 528, is: "In a judicial sense, exact conformity to some obligatory law. The doing of justice is then, the performance toward another of whatever is due him in virtue of a perfect and rigorous right, the execution of which he may demand by forcible means."

From these definitions it will be seen that the word "justice" implies a right which may be enforced by the party claiming it. Certainly under the laws of this Territory there is no right to the issuance or renewal of a liquor license. At best such issuance is a privilege which cannot be legally demanded or enforced. Conceding that the word "proceeding," as used in the statute, is broader than the term "suit," which immediately precedes it, applying the rule of *ejusdem generis*, I think it is clear that the latter word must be limited in its meaning by the former and construed to mean only such proceedings as are pending in a court of justice. (17 Am. & Eng. Enc. L. (2 ed.) 6; 26 Am. & Eng. Enc. L. (2 ed.) 609.) The words "course of justice" and "due administration of justice," and the like, are, in their ordinary and every-day use, intended and understood to apply to proceedings in courts of justice. This is shown by the very definition of the word "court," which is given by Anderson as "the place where justice is administered," and by Bouvier as "a body in the government to which the administration of justice is delegated." In the case of *Todd v. United States*, 158 U. S. 278, in which it was held that a preliminary examination before a commissioner of a circuit court is not a case pending in any court of the United States within the meaning

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of Rev. Stat. 5406 (relating to the obstructing of justice), the court, in an opinion delivered by Mr. Justice Brewer, said (p. 282):

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.' *United States v. Lacher*, 134 U. S. 624; Endlich on the Interpretation of Statutes, sec. 329, 2d. ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280." See also *Territory v. Ah Goon*, 22 Haw. 31, 32.

For the reasons herein stated I am of the opinion that the indictment charges no offense against the laws of the Territory and that the demurrer thereto, and to every count thereof, should be sustained.

MANUEL RODRIGUES MENDES v. MANUEL
JOAQUIN DE COVA.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED JUNE 8, 1915.

DECIDED JUNE 29, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

TRESPASS QUARE CLAUSUM FREGIT—proof of *locus in quo*.

In *trespass quare clausum fregit*, which is a local action, if the declaration gives the boundaries of the *locus in quo* or otherwise describes it with certainty it must be proved as laid and the plaintiff can recover only on proof of a trespass where he lays it.

SAME—same—title must be proved as alleged.

Where plaintiff relies expressly on a title by grant or of record he must prove it and evidence of a title otherwise derived is inadmissible.

Mendes v. de Cova, 22 Haw. 636.

OPINION OF THE COURT BY WATSON, J.

This is an action for damages resulting from an alleged trespass upon the lands of the plaintiff. There was a verdict of the jury and judgment in favor of the plaintiff, and the defendant brings the case to this court by writ of error. It appears from the evidence and was admitted in the argument that the plaintiff and the defendant owned adjoining closes but there was a dispute as to the place where the true line between them was. "In trespass *quare clausum fregit*, which is a local action, if the declaration gives the boundaries of the *locus in quo* or otherwise describes it with certainty, it must be proved as laid and the plaintiff can recover only on proof of a trespass where he lays it." *Hooker v. Hicock*, 2 Aikens (Vt.) 172. "Where the land is described by name, abuttals, metes or bounds, etc., it is necessary that they should be proved as laid because they afford the only means by which the defendant is notified of the place in which he was charged with committing the injury." 21 Ency. Pl. & Prac. 820. "Where the *locus in quo* is described by its abuttals, a variance from the description of any one abuttal in evidence will be fatal." 3 Starkie's Law of Evidence, 1099. See also *Peaslee v. Wadleigh*, 5 N. H. 317, 321, 322; *White v. Moseley*, 5 Pick. 230.

The declaration in this case alleges the trespass to have been committed at Hamakualoa, Island and County of Maui, in a certain close of the plaintiff lying and being in Hamakualoa "being the same premises as those described in a certain deed of conveyance made by Joao de Lima and Isabella Guillermina to Joao Mendes, under date of the 12th day of June, A. D. 1894, and recorded in Book 148, on pages 37 and 38 of the records of the Registrar of Conveyances at Honolulu; and in said conveyance described as follows, to wit: Beginning at the Northwest corner of this lot at Post 1, and running 43½ E. along Ahiong, L. C. A. 3.70 ch. to Post II, N. 60 E. 11.90 ch. along John Martins, to post III, N. 45 W. 3.31 ch. along Pico's fence to post IV, S. 64 deg. 10 W., 11.90 ch. to point of begin-

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ning; containing an area of four acres; that plaintiff acquired the said piece, parcel or lot of land by mesne conveyances from the said Joao Mendes."

Plea, the general issue.

Plaintiff therefore was bound to prove and could recover only for a trespass committed in the *locus in quo* thus described, and where, as here, plaintiff relies expressly on a title by grant or of record he must prove it, and evidence of a title otherwise derived is inadmissible. 38 Cyc. 1107. On the trial the plaintiff, to show title in himself, offered evidence to prove that he and those under whom he claimed (under an alleged oral agreement with defendant as to the boundary line between their lands) had been in actual possession of the land upon which the trespass was alleged to have been committed, claiming title to the same as lying in the close described in his declaration, for more than ten years before the act of trespass complained of. To this evidence the defendant objected on the ground that it was an attempt to prove title to land by parol evidence, and that there was a variance between the evidence so offered and the allegations of the declaration. The objections were overruled and the evidence permitted to go to the jury. At the close of the plaintiff's evidence the defendant moved for a nonsuit on the grounds, *inter alia*, that there was a fatal variance between the proof and the pleading, and that there was no evidence in the case showing that the plaintiff had title or color of title to the property which is the subject of this controversy. The motion for a nonsuit was denied. The court thereafter, at plaintiff's request, gave the following instructions, among others, to the jury:

"Instruction No. 2. The court instructs you that one of the questions for your determination in this case is the true location of the division line between the land owned by the plaintiff and by the defendant. If you believe from the evidence that the fence now referred to, and the row of trees as testified to by the plaintiff and witnesses is the true location of the division line between the plaintiff's and defendant's land, or was accepted

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and recognized by those under whom plaintiff and defendant claim as such division line, and if you further find that the defendant by and with his agents and servants wrongfully crossed over such boundary line and damaged the property of the plaintiff then you will find for the plaintiff against the defendant and assess such damages as may be compensation for such damage."

"Instruction No. 4. When the adjoining owners or claimants of land have agreed upon boundary lines or have acquiesced therein for a sufficient length of time (and more than ten years will constitute such sufficient length of time) to warrant the inference of mutual consent thereto, the line so fixed will bind the parties."

To the giving of both of these instructions plaintiff then and there excepted and now assigns the giving of each thereof as error. We are of the opinion that the jury were misdirected in the court below. In neither of the above instructions is the jury told that in order to entitle plaintiff to recover it was necessary for him to prove that the trespass complained of was committed on the lands described in the declaration, but they were told, in effect, that if they believed plaintiff, under an agreement with defendant as to the boundary line between their lands, had acquired title by adverse possession to certain lands, on which defendant thereafter trespassed (irrespective of whether the trespass was committed on the lands described in the declaration), they should find for the plaintiff. A careful reading of the transcript of evidence in this case fails to disclose any substantial evidence which identifies the land where the trespass is alleged to have been committed as any portion of the close described by metes and bounds in the declaration. Counsel for plaintiff (defendant in error), in order to effect this identification, relies on a map received in evidence in the court below as plaintiff's exhibit 1, the same having been identified by plaintiff as a plat of his land made by one J. C. Foss, presumably a surveyor (although there is no evidence of this fact), from an inspection of plaintiff's muniments of title and after having certain monuments called for in the deed pointed out to him by

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plaintiff. The plat was received in evidence without objection. Foss himself appears not to have been available as a witness and it does not appear from any evidence in the case or from said map or plat that the same was made or located according to the calls and courses and distances mentioned and contained in plaintiff's deed. There is therefore nothing to show to the court that the lines of plaintiff's deed, as set out in the declaration, when correctly laid down, would run in the manner delineated on the plat. *Clary v. Kimmell*, 18 Md. 246, 254. The plat is of no assistance to the court in aiding it to identify the lands upon which the trespass was committed as any part of the land described in plaintiff's declaration.

We are of the opinion that there was a fatal variance between the proof and the allegations of the complaint; that the verdict is not supported by the evidence, and that it must be vacated.

The case is remanded to the circuit court with instructions to set aside the judgment, to grant the defendant's motion for a nonsuit, and to enter judgment thereupon for the defendant.

E. Murphy for plaintiff in error.

E. R. Bevins for defendant in error.

Scott v. Stuart, 22 Haw. 641.

IN THE MATTER OF THE APPLICATION OF M. F. SCOTT AND NETTIE L. SCOTT FOR A WRIT OF PROHIBITION AGAINST HONORABLE T. B. STUART, THIRD JUDGE, CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII, AND JOSEPH LIGHTFOOT, ESQ., MASTER IN CHANCERY.

PETITION FOR WRIT OF PROHIBITION.

ARGUED JUNE 14, 1915.

DECIDED JUNE 30, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

COURTS—*disqualification of judge—pecuniary interest.*

A circuit judge is not disqualified to hear or determine a partition suit by reason of a pecuniary interest therein because of his having made an order directing the payment of an attorney's fee for services rendered for the judge in a prohibition proceeding growing out of the partition suit, out of a fund in court belonging to the parties to the suit, such order having no connection with the subject-matter or issues of that suit.

APPEAL AND ERROR—*final order or decree—order directing payment of money.*

An order or decree directing the payment of money, other than the payment into court for further disposition, is final in its nature and appealable.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a petition for a writ of prohibition to restrain circuit judge Stuart from proceeding further in the hearing of a suit in equity for the partition of certain land wherein the petitioners herein are plaintiffs, on the ground that the judge is disqualified by reason of pecuniary interest in the case. Org. Act, Sec. 84. The facts constituting the alleged disqualification are, in brief, these: The circuit judge had previously appointed the respondent Lightfoot as master in chancery in the partition suit under an order directing an inquiry into and a report upon the case which had become complicated; the petitioners applied

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to this court for a writ of prohibition alleging that the order appointing the master was made without jurisdiction; the writ was dismissed (*Scott v. Stuart*, ante, p. 459); thereafter the respondent Lightfoot filed a motion in the partition suit, alleging that he had been "ordered by said judge to appear in said supreme court as the attorney for said judge and in his own behalf," on the application for the writ of prohibition, asking for the allowance and payment to him of a suitable attorney's fee; the motion was granted, and an order was entered directing the clerk of the court to pay to Mr. Lightfoot the sum of one hundred dollars out of the fund on deposit in court in said suit as an attorney's fee for services rendered as above stated; thereupon the petitioners moved that Judge Stuart assign the case to another judge because he had, by the making of the said order, become disqualified from making any further order in the case; and the judge denied that motion.

The gist of the argument of the petitioners is that as the respondent Lightfoot had rendered service as an attorney in connection with the application for the writ of prohibition he was entitled to compensation therefor from Judge Stuart, and the effect of the order that Lightfoot be paid out of the fund in court belonging to the parties to the partition suit, including the petitioners, was to relieve the judge of the obligation to pay Lightfoot himself, and that in making the final decree in the case the judge will be pecuniarily interested in affirming the aforementioned order.

Upon what theory the circuit judge assumed the right to order the payment of Mr. Lightfoot for services rendered as attorney for the respondents in the former proceeding in prohibition out of moneys belonging to the parties to the partition suit is difficult to understand, and it has not been explained. But we need not pursue the inquiry as the question presented here is not as to the validity of the order referred to, but its effect. It should be pointed out, however, that that order was an appealable one, and as it was made in a proceeding inde-

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pendent of the suit for partition and foreign to the subject-matter of that suit, though growing out of it, the order would not, upon final decree, be up for reconsideration or review. An order or decree directing the payment of money, other than a payment into court for further disposition, is final in its nature and appealable. *Dole v. Gear*, 14 Haw. 554, 566; *Trustees v. Greenough*, 105 U. S. 527, 531; *Eau Claire v. Payson*, 107 Fed. 552; *In re Michigan Cent. R. Co.*, 124 Fed. 727; *People v. Prendergast*, 117 Ill. 588. An appeal from a final decree in equity brings up for review by this court all interlocutory orders not appealable directly as of right which dealt with issues in the case. *Lee Chu v. Noar*, 14 Haw. 648, 650. Whether such an appeal would bring up for review an intermediate order directly appealable because final in its nature and settling some issue in the case we are not required to say. The point made by the petitioners that in directing the payment of the attorney's fee out of the fund in court the judge relieved himself of the necessity of paying it might perhaps have been urged as a ground of disqualification of the judge, by reason of interest, from making that order, but there is no merit in the contention that by reason of having made that order the judge acquired a pecuniary interest in the partition suit, for, as above stated, the order for the payment of the money had no connection with the subject-matter or issues of the suit.

For these reasons the alternative writ issued herein must be dismissed.

M. F. Scott for petitioners.

J. Lightfoot for respondents.

Mercer v. Kirkpatrick, 22 Haw. 644.

JANE MERCER v. GEORGE R. F. KIRKPATRICK, KENNETH A. McLEOD, GEORGE HAWKINS, NESTA DAVIS MERCER FRANKS, GEORGE F. STRAUB (AS GUARDIAN OF THE PERSONS OF HERBERT EARLE MERCER, JOHN FREDERICK MERCER AND DOROTHY MARION MERCER, MINORS), HERBERT EARLE MERCER, JOHN FREDERICK MERCER AND DOROTHY MARION MERCER.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

ARGUED JUNE 14, 1915.

DECIDED JULY 1, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

WILLS—omissions—supplying words.

Where, in a will, there is an entire absence of designation of the object of an intended gift the attempt to make the gift must be held to have failed. Words omitted by the testator may be supplied by the court only when it is clear from the words used what words have been omitted.

SAME—intention of testator—evidence of surrounding circumstances.

Where a will contains a latent ambiguity, or its language is uncertain and indefinite, extrinsic evidence is admissible to show the facts and circumstances that surrounded the testator at the time he executed his will so as to assist the court in ascertaining his intention. But where the testator has omitted to designate, expressly or impliedly, the object of an intended gift, the omission may not be supplied upon extrinsic evidence of intention.

SAME—extrinsic evidence—declarations of testator.

Evidence of declarations made by a testator as to the intent of his will is not admissible to supply an omission consisting in the entire failure to designate the object of an intended gift.

QUIETING TITLE—statutory action—litigating title between defendants.

Whether in an action to quiet title to land under Ch. 153, R. L. 1915, when the plaintiff has failed to show title, the defendants may litigate a disputed title between themselves, *quære*.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an action brought under the statute (Ch. 153, R. L. 1915) to quiet the title to certain land situate at Kapahulu,

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city and county of Honolulu. The several parties to the action claim title in fee simple under the will of John Byron Mercer, who died in Honolulu on December 18, 1913, the premises in dispute being his home at the time of his death.

The will in question was made at Edmonton, Alberta, Canada, on September 9, 1912, while the testator was on a visit to that city, his former place of residence. The controversy has grown out of the uncertainty involved in the second paragraph of the will. The material portions of the will in the order in which they appear in what is certified to be a *fac simile* copy of the original are as follows:

"I give, devise and bequeath all my real and personal estate which I may die possessed of or interested in, in the manner following that is to say: I give and bequeath to my wife Jane Mercer, all articles of personal, domestic or household use or ornament, including all my furniture, furnishings, fixtures, books, pictures, provisions, plate and all other household effects which at the time of my death shall be in, about or belonging to the house in which I shall be residing at the time of my decease;

"I give and bequeath all of those certain lots or parcels of land situate lying and being at Kapahulu" etc., describing at length the premises in dispute, but not naming or describing the object of the gift.

"I give all my real and personal property whatsoever and wheresoever situate, and not hereby otherwise disposed of, unto my trustees," upon certain trusts, after payment of debts, in favor of the testator's wife and children.

The trustees named in the will are residents of the city of Edmonton. The testator left surviving him his widow, the plaintiff, three children by a former marriage, and two children by the present widow, who are defendants herein. The defendants, in two sets, filed answers denying the title claimed by the plaintiff, and claiming title in themselves, also cross-complaints in which they asserted title against the other defendants; the trustees claiming to take under the residuary clause, and the

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children claiming to take as heirs of the decedent by reason of an intestacy as to this land. The court below held that the plaintiff did not take under the will, and sustained the claim of the trustees under the third paragraph. The case comes to this court upon the bill of exceptions of the plaintiff. As this is an action at law (*Kahoiwai v. Limaue*, 10 Haw. 507; *Flores v. Maka*, 11 Haw. 512) and as the statute contains no provision for the filing of cross-complaints by defendants as against each other it is at least doubtful whether the circuit court, after holding that the plaintiff had shown no title, should have passed upon the cross-claims of the defendants. In a recent case (*Harrison v. Davis*, ante p. 465) we pointed out that in an ordinary case of this kind the plaintiff must show title before a defendant can be required to show his title. However, the point has not been argued in the present case, and, upon this bill of exceptions it will be necessary to pass only upon the plaintiff's contentions.

On behalf of the plaintiff it is contended (1) that a fair construction of the will taken as a whole, and by itself, requires that the word "her" should be implied and read into the paragraph by which the testator undertook to dispose of the premises in dispute after the words "I give and bequeath," in order to give effect to what is claimed to have been the obvious intention of the testator to give the homestead to his wife; (2) that the will read in the light of the circumstances surrounding the testator at the time of its execution discloses clearly that such was his intention; and (3) that evidence of an express declaration made by the testator of his intention to devise the premises to his wife was erroneously excluded by the trial court. In support of the first contention the presumption against partial intestacy is invoked; also the presumption that a testator intends to make ample provision for his widow; and it is pointed out that the testator stated in his will that he thereby disposed of all his real and personal estate; that the furniture and other contents of the home were given to the wife; that the wife, who, upon the death of the testator, would become the head of the family and

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have charge of the minor children, would be the natural beneficiary of the homestead; that there is nothing in the will to indicate that any other person was the donee; that the will does show that the testator did not intend to devise the home to the trustees; and that the punctuation harmonizes with the view contended for as the paragraph by which the personal property was given to the wife was separated from that which described the homestead premises by only a semicolon, the two making, it is contended, practically one paragraph.

In dealing with wills the function of the court is to ascertain, if possible, and give effect to, if it be not unlawful, the intent of the testator as he has expressed it in the instrument, and, in case of any latent ambiguity, or of uncertainty or incompleteness of expression in the will, to accept the aid of evidence of surrounding circumstances which will place the court as near as may be in the position of the testator as of the time he made the will. To this end also certain presumptions are indulged, and certain canons of construction, designed to aid in discovering the intention, may be made use of, and courts are authorized to reject surplus words and to supply words obviously omitted through ignorance or inadvertence where it is clear what words the testator intended to have used. "Where it is evident from the context that the testator's intention has been inaccurately or incompletely expressed by the words used, and it is also equally evident what words have been omitted, these words may be supplied in order that the testator's intention may be given effect." 30 A. & E. Enc. L. (2d ed.) 690. "To supply missing words where the words used do not show what they must necessarily have been is to step over the limit of the power of the court which is to discover the intention which the testator has expressed by the words used by him." *Boston Safe Deposit Co. v. Buffum*, 186 Mass. 242. The foregoing are elementary principles—difficulty lies only in their application.

A will is a disposition of property to take effect on or after the death of the owner. Such a disposition of property implies

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a subject-matter of gift and an object. By statute (R. L. 1915, Sec. 3260) a will must be in writing signed by the testator and attested by two or more witnesses. It is necessary, therefore, to constitute a complete and valid testamentary gift that the testator shall have executed a writing containing words which expressly or by implication designate both the subject of the gift and the person to whom it is given. Where there is an entire absence of designation of either the subject or object of an intended gift the attempt to make the gift must be held to have failed for the court cannot create a gift where the testator himself has not made one. In the will in hand the second paragraph commences as a new and independent provision which is not so connected grammatically with the first paragraph as to permit of the implication of the pronoun "her," relating to the object of the gift contained in the first paragraph, by any conjunctive word. Any force there might have been in the fact that the punctuation used at the end of the first paragraph was a semicolon is destroyed by the further circumstances that at the end of the paragraph next preceding the testimonium clause, where a period would have been proper, a semicolon was used, and that in other respects the testator was not consistent in his use of punctuation marks. See *Lewisohn v. Henry*, 179 N. Y. 352, 363; *Reynolds v. Reynolds*, 43 S. E. (S. C.) 878, 881. In so far, then, as the will taken by itself is concerned, there is an entire omission to designate, expressly or impliedly, the object of the intended gift of the property in question. The second paragraph was intended to be complete in itself, and, but for the omission of the object, it would have been complete. That it seems natural and probable, in view of the other provisions, that the testator intended to give the home to his wife, is not enough to require the court to undertake to supply the omission. for, after all, the testator may have intended to name one or more of the children. Counsel concede that in no case should the court supply an omission in a will upon a mere conjecture. It is the intention which the testator has expressed in his will

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that controls and not that which he may have had in his mind. 40 Cyc. 1389. "It is not the province of the court to conjecture what the intention of the testator would have been had the omission been called to his attention. It is the more restricted duty of ascertaining his intention by construing the words which he has used and of supplying the words which the court finds necessary to express that intention fully. It cannot supply words to give effect to an intention which he has not expressed by the words used by him." *Child v. Child*, 185 Mass. 376, 378. Of the cases cited in the plaintiff's brief the one which went the farthest is *Eatherly v. Eatherly*, 41 Tenn. 461. That was a suit in equity to reform a will, and the court held that it was authorized, under the circumstances which need not be recited here, to supply the subject-matter which the testator had omitted from one clause of the will. It was an extreme application of the rule that omitted words may be supplied where the context clearly shows what words were intended to be used. Whether or not a case comes within that rule can be decided only upon an examination of the particular will involved, and adjudicated cases are of little or no assistance in the determination as no two wills are alike. In our opinion the context of Mr. Mercer's will does not clearly show who he intended to name as devisee in the second paragraph.

The next question is whether, as the will itself does not show clearly who the intended devisee was, the evidence of the circumstances which surrounded the testator at the time he made his will, and which, it is urged, confirm the contention that he intended to name his wife as the devisee, may be availed of as a basis for supplying the omission. The fundamental obstacle in the case at bar, and like cases, is not that the testator has not made his intention clear, but that he has failed to express it. "Where the will contains a latent ambiguity, or its language is uncertain and indefinite, it is a firmly established rule that parol evidence is admissible to show the facts and circumstances that surrounded the testator at the time of the execution of the

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will, such as the condition and situation of his property and family, so that the court may be placed as nearly as possible in his position, and thus arrive at his intention." 30 A. & E. Enc. L. (2d ed.) 676. But "It is well settled that omissions in a will, though due to accident or mistake, cannot be supplied by parol proof of intention." Id. 680. See also 2 Underhill on Wills, Sec. 912, and the following cases of omission of subject-matter or object in which the rule was applied. *Hunt v. Hort*, 3 Bro. C. C. 312, 29 Eng. Rep. 554; *Baylis v. Atty. Genl.* 2 Atk. 239, 26 Eng. Rep. 548; *Engelthaler v. Engelthaler*, 196 Ill. 230; *Everett v. Carr*, 59 Me. 325, 331; *Lefevre v. Lefevre*, 59 N. Y. 434, 441. There is no difference in principle between the supplying of the subject of the gift and of the object of the bounty. *Thompson v. Thompson*, 115 Mo. 56, 70. We hold, therefore, that the extrinsic evidence of the surrounding circumstances which, it may be conceded, point toward the wife as the probable devisee intended, may not be used for the purpose of supplying the omitted expression of intent.

The final question presented by the exceptions is whether the trial court erred in refusing to admit testimony (which was offered) of a declaration said to have been made by the testator to his wife immediately after he had made his will, when handing her a copy of it, that "I made my will today, and I thereby give you the home." The rule is that evidence of declarations or statements made by the testator as to the intent of his will, though admissible in cases of latent ambiguity (40 Cyc. 1435), is not admissible in cases like this. *Lurie v. Radnitzer*, 166 Ill. 609, 618; *Foster v. Smith*, 156 Mass. 379, 385; *Walton v. Draper*, 206 Mass. 20, 22; *Lowe v. Whitridge*, 105 Md. 183; *McAlee v. Schneider*, 2 App. Cas. (D. C.) 461, 467; *Zabriskie v. Huyler*, 62 N. J. E. 697, 701. "A testator's declarations of his intentions are inadmissible, though logically they would seem to be the best evidence obtainable. They are excluded, however, by reason of the statute, which requires wills to be in writing, and also of the rule that forbids the introduc-

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tion of parol evidence to alter or vary written instruments." *Gould v. Chamberlain*, 184 Mass. 115, 121. There being no latent ambiguity, the evidence offered was properly rejected.

The exceptions are overruled.

J. T. DeBolt for plaintiff.

W. F. Frear, A. M. Cristy and C. H. Olson (Frear, Prosser, Anderson & Marx and Holmes, Stanley & Olson on the brief) for defendants.

REBECCA L. WAIWAIOLÉ v. LYDIA KULAEA AND
KULAEA, HER HUSBAND, JOSIAH K. WAIWAI-
OLÉ AND LAURA K. WAIWAIOLÉ, HIS WIFE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED JUNE 28, 1915.

DECIDED JULY 2, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

PARTITION—*pleading—averment of title.*

In a bill for the partition of land the complainant must show that he is a tenant in common of an estate in possession. This requirement is met by averments that the complainant and the defendants (in undivided shares) own the land in fee simple. Actual possession by the complainant need not be averred.

SAME—*accounting—rents.*

In a suit for partition a cotenant may be required to account for rents collected by him from third parties for the use of the common land.

EQUITY—*pleading—verification of bill.*

A jurat to a bill in equity by which the complainant deposes that "the matters and things therein stated are true of his own knowledge, save as to the matters therein alleged upon information and belief, and those he believes to be true," is in compliance with rule 25 of the circuit court of the first circuit.

Waiwalole v. Kulaea, 22 Haw. 651.

OPINION OF THE COURT BY ROBERTSON, C.J.

The complainant filed a bill for the partition of certain land, and for an accounting for rents alleged to have been collected by the defendant Lydia Kulaea. The bill, *inter alia*, contained the following averments:

"2. That your petitioner is the owner in fee simple of an undivided one-third (1|3) part and share of the lands and tenements situate at Kamakela, Honolulu aforesaid, being a portion of the land described in R. P. 6817, L. C. A. 2177, and particularly bounded and described in the Schedule hereto annexed and hereby made part hereof, marked Exhibit A."

"3. That your petitioner is informed and believes and upon such information and belief alleges that said respondents are entitled to the remaining undivided two-thirds (2|3) of said lands in fee simple."

"5. That your petitioner is informed and believes and upon such information and belief alleges that said respondent Lydia Kulaea has for several years past collected the rents issues and profits from a portion of said land and has used and enjoyed the balance of said land in common with said petitioner. That said petitioner has demanded an accounting from said respondent Lydia Kulaea of and concerning said rents issues and profits and has requested said respondent Lydia Kulaea to pay to petitioner her share of such rents issues and profits but said respondent Lydia Kulaea has failed and refused to make any accounting and to pay any portion of said rents issues and profits."

The defendants demurred separately to the bill on the grounds that sufficient facts to entitle the complainant to the relief sought were not stated; that it does not appear that the defendants claim any interest in the land, or that the complainant and defendants are cotenants in or of the land; and that it does not appear that at the time of the alleged collection of rents the complainant had any right, title or interest in the land, or that she was, at that time, a cotenant therein of said Lydia Kulaea.

The complainant appeals from a decree sustaining the de-

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murrers and which was evidently intended to dismiss the bill upon the complainant's declining to amend.

Counsel for the appellees contend that the complainant in a partition suit must show not only title, but also possession or the right of possession; that it must be shown that a cotenancy exists between the parties, and that the defendants in fact claim an interest in the land.

Counsel cite 30 Cyc. 189, to the effect that the right to partition land is dependent on the plaintiff's being "a cotenant entitled to possession as such of the land sued for." That means, as shown by the paragraph of the text next following (p. 190), that the "plaintiff must show that he is a tenant in common of an estate in possession." This is a well settled general rule. 15 Enc. Pl. & Pr. 784; *Baker v. Puni*, 14 Haw. 179; *Allen v. Libbey*, 140 Mass. 82. And the requirement was sufficiently met by the averments in the bill that the complainant "is the owner in fee simple" of an undivided one-third of the land and (upon information and belief) that the defendants "are entitled to the remaining undivided two-thirds of said land in fee simple." The pleader "will be aided by the presumption that possession usually follows the legal title when no adverse possession is shown." 6 Pom. Eq. Jur., Sec. 709. Actual possession by the complainant need not be averred. "A constructive possession, such as the law draws to the title, is sufficient for the maintenance of the action. It is alleged that the ancestor and each of the parties owned in fee, and that is all that is required." *Wainman v. Hampton*, 110 N. Y. 429, 433. See also *Heinze v. Butte & Co. Min. Co.*, 126 Fed. 1. Title in fee simple—the highest estate in land known to the law—is an estate in possession, and an averment of ownership by such a title implies the right of immediate possession. *McBryde Sugar Co. v. Koloa Sugar Co.*, 19 Haw. 106, 122; *Gage v. Kaufman*, 133 U. S. 471. That the parties are cotenants of the land necessarily follows from their undivided ownership of the premises in fee simple, and it was not necessary to aver that, in addition to own-

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ing such an interest, the defendants in fact "claimed" such interest.

The contention that the bill does not show that at the time the respondent Lydia Kulaea is alleged to have collected rents, issues and profits from the land there was an existing cotenancy between her and the complainant is not sustained. The averment might have been more explicit, but we think that the fact sufficiently appears from paragraph 5 of the bill. A cotenant may be required to account for rents collected by him from third parties for the use of the common land. 30 Cyc. 232; *Peterson v. Kaanaana*, 10 Haw. 384, 387.

The circuit judge was in error in taking the view that the verification of the bill was not in accordance with circuit court rule 25. The jurat to the bill was in the usual form. By it the complainant deposed that "the matters and things therein stated are true of her own knowledge, save as to the matters therein alleged upon information and belief, and those she believes to be true." This was in compliance with the rule which was designed to inhibit the verification of entire bills upon information and belief, and to segregate in the jurat matters stated positively from those averred upon information and belief.

The demurrers should be overruled.

The decree appealed from is reversed and the case remanded to the circuit judge for further proceedings.

C. F. Peterson for complainant.

R. J. O'Brien (*E. C. Peters* with him on the brief) for defendants.

JULY, 1915.

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H. KAPELA v. R. L. GILLILAND.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED JUNE 29, 1915.

DECIDED JULY 10, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

LIMITATION OF ACTIONS—*statute must be pleaded.*

Under rule 4 of the circuit court of the first judicial circuit the statute of limitations, as a defense in personal actions, must be specially pleaded, and the bar of the statute cannot be first urged by a motion for a nonsuit or by objection to the admission of evidence.

ASSUMPSIT—*defense of payment—non-prejudicial error.*

Where in an action of assumpsit for money had and received the answer is a general denial unaccompanied by notice of defendant's intention to rely upon the defense of payment, and on the trial the defendant testifies that he received the money sued for, the admission in evidence of hearsay testimony tending to prove that defendant had not paid back such money is non-prejudicial error of which defendant will not be heard to complain.

OPINION OF THE COURT BY WATSON, J.

This is an action in assumpsit in which the circuit court, jury waived, gave judgment for the plaintiff for \$85.70. Plaintiff's declaration contains three counts as follows: (1) for money had and received by the defendant from the Ekalesia Hoolepope o Waianae (The Protestant Church of Waianae) on the 14th of February, 1903, the claim for which was assigned to plaintiff, and alleging an agreement by the defendant, made on September 10, 1914, to pay the said sum; (2) an account stated on September 10, 1914; (3) money had and received by the defendant to and for the use and benefit of the Ekalesia Hoolepope o Waianae, a promise to pay the same on September 10, 1914, and an assignment of the claim to the plaintiff. The answer filed by defendant was a general denial.

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At the trial the plaintiff gave in evidence a receipt reading as follows:

“Waianae, February 14, 1903.

“Received from S. K. Hui, chairman of committee of Ekalesia Hoolepope o Waianae, for deposit \$85.70 dollars.

“R. L. GILLILAND.”

The defendant, being called as a witness on behalf of plaintiff, identified this receipt as having been given by him and testified that when he gave the receipt he had the money and that he had not paid the money back either to Hui or the church. (Transcript p. 7.) Later on cross-examination the defendant testified that he received the money at the time he gave the receipt but that he had paid it back. (Transcript p. 7.) Defendant's financial transactions with the church were numerous, covering a long period of time, but he kept no books of account and was unable to produce any receipt showing repayment by him of the amount covered by his receipt of February 14, 1903. On his re-direct examination he testified that he had no independent recollection of this particular item, but that he knew he did not owe the church a cent.

There was also given in evidence by plaintiff a written assignment of this claim to himself as follows:

“On motion of S. P. Kaahaaina it was resolved that the claim against R. L. Gilliland of \$85.70 with interest from February 14, 1903, for money deposited by S. K. Hui belonging to the church, be assigned to H. Kapela for collection by law or otherwise, as Mr. H. Kapela may determine.”

“For value received the above and foregoing claim is assigned to H. Kapela for collection.

“S. P. KAAHAAINA,

“Treasurer.

“Dated this 9th day of January, A. D. 1915,”

and also the charter of incorporation of the Waianae Protestant Church. The defendant comes to this court on exceptions which go to the admission of certain evidence both oral and document-

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ary, the denial of defendant's motion for a nonsuit, and to the decision and judgment of the lower court.

The assignment was objected to on the ground that it was incompetent, irrelevant and immaterial and indefinite and uncertain in that it did not show any proper authorization for the transfer of any claim belonging to any particular church. We are of the opinion that the testimony of the plaintiff was sufficient to show that the claim referred to was that evidenced by the receipt now sued on.

The receipt in evidence of the charter of incorporation of the church was objected to on the ground that it was incompetent, irrelevant and immaterial, which objection was overruled and the document received in evidence. Inasmuch as the plaintiff claimed by assignment from the incorporated body we think this evidence was properly admitted as going to show plaintiff's title—his right of action upon the claim. It is contended in this court that there is no showing in the record of any assignment to the corporation of the alleged debt. The point does not appear to have been raised in the court below, and there was certainly no sufficient objection to the introduction of the charter in evidence to permit counsel for the defendant to raise the question in this court under this exception. The charter was relevant for the purpose for which it was offered, as showing a link in plaintiff's chain of title, and the court was justified in receiving it on the assumption that it would later be connected up. 3 Wigmore on Evidence, §1871. The evidential fact offered had an apparent connection with the case and the order of proof is necessarily subject to the discretion of the trial court. *Mist v. Kawelo*, 13 Haw. 302; *Territory v. Armstrong*, 22 Haw. 526. And assuming, without deciding, that plaintiff later failed to connect up his chain of title, a motion to strike the evidence theretofore received would have been an adequate remedy. A motion for a nonsuit on the ground of failure of proof or an exception to the decision as being contrary to the evidence would have raised the question as to the alleged failure of proof and secured a ruling

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from which an exception would properly lie. But defendant did not adopt any or either of these methods to bring the question before this court.

The third exception is to the ruling of the court in permitting the plaintiff Kapela to testify that the money deposited with the defendant belonged to the church before it was incorporated and "belongs to the church now." This testimony was objected to on the ground that it was a conclusion of the witness. The witness having testified that he was chairman of the board of trustees of the Waianae Protestant Church, and it appearing from the assignment of the claim to him that it was so assigned for the purpose of collection, we think there was no error in permitting this evidence to go in.

Of the remaining exceptions several relate to the admission of testimony which was objected to on the ground that it appeared therefrom that plaintiff's claim was barred by the statute of limitations; also at the close of plaintiff's case defendant moved for a nonsuit on the sole ground that it appeared that the statute of limitations had run. As to this group of exceptions it is sufficient to say that rule 4 of the circuit court of the first judicial circuit, which has the force of law, provides that "In personal actions, the statute of limitations shall be specially pleaded; and no defendant shall be allowed to set up by way of defense to the plaintiff's claim, any illegality, * * * payment * * * unless he shall, on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same." It is well settled that the statute of limitations cannot be first urged by a motion for nonsuit or by objection to the admission of evidence. 25 Cyc. 1405. "The objection that the action is barred cannot be taken to the admissibility of evidence when the statute has not been pleaded." *Meeks v. Hahn*, 20 Cal. 621.

Other exceptions relate to the admission of testimony tending to prove that defendant had not paid back the money to the church. This testimony was objected to on the ground that it

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was hearsay. In view of the fact that the defendant himself testified both on direct and cross-examination, when on the stand as a witness for the plaintiff, that he had the money at the time he gave the receipt for it (transcript p. 7), and in further view of the fact that he had given no notice in his answer that he intended to rely upon the defense of payment (in compliance with the provisions of rule 4, supra), it cannot be said that the defendant was prejudiced by the rulings of the court admitting this testimony. "Payment is an affirmative defense which cannot be relied upon unless expressly pleaded, and cannot be shown under a general denial. * * * In some states notice of payment under a general issue takes the place of a special plea and supplies its place." 30 Cyc. 1253, 1254.

The two last exceptions—one to the decision of the lower court and the other to the judgment entered thereon (neither of which states the ground of defendant's objection)—are too general and indefinite to be considered. *Scott v. Kona Development Co.*, 21 Haw. 258; *Ripley & Davis v. Kapiolani Estate*, 22 Haw. 507, 509.

We are of the opinion that the exceptions should be overruled and it is so ordered.

Exceptions overruled.

C. C. Bitting (*Bitting & Ozawa* on the brief) for plaintiff.

J. Lightfoot for defendant.

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DONG YOU, YONG KWONG QUON, LAU KAU FAI, LAU DUCH YONG, LEE KAI, LUM BOY LUN, WONG GUN, YONG KWONG TAT, CHOY IN, LOU CHOW, PANG LUM MAN, CHONG FONG, WONG NAP KEE, YIN KOW, LOO KEAU, TOM KIN, WONG IN, YONG LUM KONG, LAU MAN YUNG, CHEE CHEU HIN, LUM WAI CHAN AND LUM DO SAU, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF HONOLULU FIREWOOD COMPANY, *v.* WING HING COMPANY, LIMITED, A CORPORATION.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. W. J. ROBINSON, JUDGE.

SUBMITTED JULY 1, 1915.

DECIDED JULY 12, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

CORPORATIONS—*partnership—implied power.*

A corporation has no implied power to form a copartnership with individuals.

SAME—*authority to form copartnership.*

Section 3388, R. L. 1915, which authorizes two or more corporations to enter into partnership with each other does not authorize a corporation to form a copartnership with an individual.

SAME—*liability for value of benefits received under ultra vires contract—remedy of other party to such contract.*

Where money has been paid or property transferred to a corporation under a contract *ultra vires* but not *malum in se* or otherwise immoral, and the other party has not received the consideration for it, an action of assumpsit, or other appropriate action not based on the unlawful contract, may be maintained for its recovery.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiffs, as copartners under the firm name of the Honolulu Firewood Company, instituted an action of assumpsit in the circuit court against the defendant corporation upon two counts, one for money had and received, the other upon an ac-

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count stated. The defendant interposed a plea in abatement alleging that the plaintiffs and the defendant are copartners doing business under the firm name of the Honolulu Firewood Company, and that the matters and things alleged in the complaint relate to and arise out of unsettled partnership affairs. The plea, being traversed, was overruled *pro forma* upon the understanding that the whole case would be tried under an answer of general denial which the defendant then filed. At the conclusion of the trial the court held that the plea in abatement should have been sustained and that the defendant's motion for a nonsuit based upon the same ground should have been granted. Judgment for the defendant was thereupon entered. The plaintiffs then moved for a new trial alleging error in the rulings and judgment. The motion was granted, the court holding that the contract of partnership between the parties, the existence of which was not denied, was *ultra vires* on the part of the defendant and void, and that the plaintiffs were not estopped from treating it as such. Upon the second trial the court found upon the evidence that the amount claimed by the plaintiffs (\$1655) was due them from the defendant, and judgment for the plaintiffs was entered in accordance with the findings. The defendant then sued out this writ of error assigning error in the decision and judgment of the circuit court and in the rulings made by the court whereby defendant's plea in abatement was overruled and plaintiffs' motion for a new trial granted.

It appeared in evidence that on May 27, 1907, the plaintiffs and the defendant by written articles entered into a copartnership under the firm name above stated for the purpose of buying, selling and dealing in firewood, and the business was carried on accordingly. An arrangement was agreed upon whereby the defendant corporation, which was engaged in the draying business, would find customers and solicit orders for firewood with the sole right to make delivery thereof to purchasers to whom the cartage would be charged, the price of the wood, per cord, to be fixed by the manager of the copartnership, and the

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corporation to make the collections and account for the value of the wood to the firm. From and since the commencement of the business about twenty-seven thousand dollars worth of firewood had been handled under that arrangement and had been accounted and settled for by the defendant except as to the amount involved in this case.

The defendant was incorporated on the 11th day of July, 1904, with power "to buy, sell and deal in firewood * * * to do a general drayage and hauling and contracting business * * * to act as agents in all cases and for all purposes for which agents may be appointed * * * to acquire, purchase, hold, sell or mortgage shares and bonds of any other corporation * * * to do and transact any other business, agricultural, mercantile, mechanical or otherwise." Power to enter into partnership with individuals was not mentioned in the enumeration of powers contained in the articles of incorporation.

The general questions presented for consideration are whether the contract of partnership was *ultra vires* on the part of the defendant, and, if so, is there anything to prevent the plaintiffs from recovering in assumpsit the value of the firewood as represented by the unpaid balance of account. This is not a case of a corporation defending against an attempted enforcement of a contract which it had no power to enter into, nor is it a case of a corporation suing upon an *ultra vires* contract. The claim that the contract of partnership was *ultra vires* was asserted by the plaintiffs in support of their position that the case was properly brought in a court of common law, the action being in assumpsit and in disaffirmance of the contract of partnership.

On behalf of the plaintiff in error it is contended that the statutes of this Territory authorize corporations to form partnerships with individuals. Section 3388, Rev. Laws, 1915, provides that any two or more corporations organized under the laws of this Territory may enter into partnership with each other for the furtherance of their common and authorized objects. Section 16 (R. L. 1915), relating to the construction of

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statutes, provides that "the word 'person,' or words importing persons * * * signify not only persons, but corporations, societies, communities, assemblies * * * and the public generally, where it appears, from the subject matter, the sense and the connection in which such words are used, that such construction is intended." From this it is argued that the word "corporations" in section 3388 should be construed to mean or include "persons" and, so construed, would authorize corporations to form partnerships with individuals. There is neither logic nor merit in the argument. Aside from statute corporations are known to the law as persons—artificial or fictitious persons—but not as individuals or human beings. The statute which authorizes two or more corporations to enter into partnership with *each other* cannot by any reasonable construction be held to authorize a partnership between a corporation and an individual. The sense and connection in which the word "corporations" is used in the statute show that it was not so intended. Nor are we able to hold that the defendant was authorized to form the partnership in question in exercise of an implied or incidental corporate power. "According to the prevailing view a corporation has no implied power to become a partner with an individual or another corporation." 7 R. C. L. 607. See *Whittenton Mills v. Upton*, 10 Gray 582; *Central R. & B. Co. v. Smith*, 76 Ala. 572, 581; *People v. North R. Sugar Ref. Co.*, 121 N. Y. 582, 623; *Geurinck v. Alcott*, 66 Oh. St. 94, 104; *Bishop v. Am. Preservers Co.*, 157 Ill. 284, 313; *White Star Line v. Star Line*, 141 Mich. 604. The reason for this, concisely stated in *Fechtelor v. Palm Bros. & Co.*, 133 Fed. 462, 465, is that "the agency of each partner for the partnership is inconsistent with the management of the corporation by its stockholders through directors and officers chosen only by themselves." It follows that the contract of partnership between plaintiffs and defendant was beyond the power of the defendant to make, and *ultra vires* on its part.

Next, it is contended by counsel for the plaintiff in error

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that if the contract was *ultra vires* the plaintiffs are estopped, because parties to it, from asserting its invalidity. There is some conflict of authority on the question whether and, if at all, under what circumstances, corporations and individuals dealing with corporations should be held estopped from setting up the invalidity of contracts entered into by them as being beyond the power of the corporation to enter into. The doctrine maintained by some courts that a contract of even a private corporation which was made without lawful power may not be rendered valid or enforceable either by ratification or estoppel has been criticized by some able modern writers. See 5 Thompson on Corp., Secs. 5971, 5973. But there is abundant authority for the proposition that where, as in the case at bar, money has been paid or property transferred to a corporation under a contract *ultra vires* but not *malum in se* or otherwise immoral, and the other party has not received the consideration for it, an action of assumpsit, or other appropriate action not based on the unlawful contract, may be maintained for its recovery. See 5 Thompson on Corp. Secs. 5983, 6004; 2 Morawetz on Corp., Sec. 721; *Parkersburg v. Brown*, 106 U. S. 487, 503; *Pittsburg etc. R. Co. v. Keokuk Bridge Co.*, 131 U. S. 371, 389; *Citizens Nat. Bank v. Appleton*, 216 U. S. 196; *White v. Franklin Bank*, 22 Pick. 181, 186; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 275; *Central R. & B. Co. v. Smith*, 76 Ala. 572, 582; *Gas-Light Co. v. United Gas etc. Co.*, 85 Me. 532, 541; *Tennessee Ice Co. v. Raine*, 107 Tenn. 152, 159; *M. & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 132; *Brown v. Atchison*, 39 Kan. 37, 54; *Pratt v. Short*, 79 N. Y. 437, 445; *Greenville Co. v. Planters Co.*, 13 So. (Miss.) 879; *Foulke v. Railroad*, 51 Cal. 365; *Lincoln Land Co. v. Grant*, 57 Neb. 70. So far as the case in hand is concerned the point goes only to the forum in which the plaintiffs below should have sought relief. Upon the theory of the plaintiff in error the suit should have been instituted in equity upon the contract of partnership for an accounting. We do not say the plaintiffs could not have

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pursued that course. Nothing in the record suggests that the defendant had any equitable defense which was not available to it in the trial at law. If it had such it could itself have taken the controversy into a court of equity. The account was not a complicated one such as could not conveniently be tried at law, and we know of no good reason why the action for money had and received to recover the sum which, aside from the *ultra vires* contract, represented the benefit received and retained by the defendant and the amount justly and equitably due and payable to the plaintiffs ought not to have been sustained. The defendant cannot well complain that the plaintiffs have treated as void a contract which it had no right to make and which it was its duty to rescind.

The judgment of the circuit court is affirmed.

J. Lightfoot for plaintiff in error.

E. C. Peters and *R. J. O'Brien* for defendants in error.

EUGENE MURPHY v. H. R. HITCHCOCK AND O.
TOLLEFSEN.

APPEAL FROM DISTRICT MAGISTRATE OF MOLOKAI.

SUBMITTED JULY 13, 1915.

DECIDED JULY 19, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

FISH—ownership of when confined.

Where one catches fish in public waters and confines them in a private pond having no outlet to public waters, he becomes the owner of such fish and may recover their value from another wrongfully taking them from his possession.

EXECUTION—sale of leasehold interest in pond—fish.

Fish in a private pond, unconnected with public waters, do not pass by sale of a leasehold interest in the pond made under execution, the levy and notice of sale being silent as to the fish, and the execution defendant being admitted to be the owner of the fish at the time of the levy and sale.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced an action in the district court of Molokai to recover from the defendants \$165, the alleged value of certain fish alleged to have been taken by the defendants from a fish pond called "Kupeke" in December, 1914, alleged to be the property of the plaintiff. The cause was submitted on an agreed statement of facts in writing, wherein it is agreed as follows:

"1. That on the 4th day of November A. D. 1914 judgment was rendered in favor of one Otomatsu Kanayama and against one Akutagawa for the sum of 676.82.

"2. That at the time of the rendition of the judgment the defendant Akutagawa was the holder of a lease on a pond known as 'Fish Pond of Kupeke.'

"3. That the said pond of Kupeke is a pond enclosed from the sea and into an from which fish cannot enter nor leave, and is used for the purpose of raising pond mullet for the market.

"4. That the Sheriff of the County of Maui in furtherance of the judgment mentioned in paragraph '1' levied on, among other property the leasehold for the said 'Fish Pond of Kupeke'

"5. That the said leasehold in which the said 'Fish Pond of Kupeke' is situated was sold at public auction on the 12th day of December A. D. 1914 to Otomatsu Kanayama, and that the defendants claim under that sale and claim that the sale of the leasehold conveyed all the fish in the 'Fish Pond of Kupeke'

"6. That on the 12th day of December A. D. 1914, and shortly after the sale of the leasehold by the sheriff the plaintiff herein purchased all the fish in the said 'Fish Pond of Kupeke' from Akutagawa, who was acknowledged to be the owner thereof, except for the levy and sale of the leasehold.

"7. That the defendants herein knew that the plaintiff herein claimed to be the owner of the fish in the said 'Fish Pond of Kupeke' and were present when plaintiff purchased and paid for the same to Akutagawa.

"8. That the defendants herein claiming to have acquired all the fish under the sale of the said leasehold of the said 'Fish Pond of Kupeke' removed therefrom fish of the value of \$75.00.

"That as a part of this submission of facts, the original lease

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from Mrs. Buchanan to Akutagawa, and papers in the case, of Omoatsu Kanayama vs Akutagawa as follows:

- "1. Sheriffs notice of sale
- "2. Sheriffs bill of sale
- "3. Bill of sale from Akutagawa to Eugene Murphy, purporting to convey the fish in the 'Fish Pond of Kupeke.' "

The district magistrate decided in favor of the defendants and from the judgment the plaintiff has appealed directly to this court upon points of law set forth in his appeal as follows:

"1. That the court erred in rendering judgment for the defendants herein.

"2. That the court erred in holding that the fish in the pond passed to the purchaser of the leasehold at the sale thereof by the sheriff.

"3. That the court erred in holding that the purchase of the fish in the fish pond from the owner thereof did not pass title to said purchaser.

"4. That the court erred in holding that the sheriff could pass title in the fish pond herein involved without selling or levying on the same and giving notice that he offered said fish in the fish pond for sale."

The lease of the pond under which plaintiff's vendor held was made a part of the agreed statement of facts. Said lease runs for a term of five years, but says nothing about fish in the pond and contains no condition as to the growing or removal of fish in or from the pond. The levy and sale under execution was upon the leasehold estate of Akutagawa only. No levy upon the fish in the pond, or sale thereof, as personal property or otherwise is shown to have been made by the sheriff under the execution. The only question before us for determination is, did the levy and sale of the leasehold carry with it the ownership or title to the fish in the pond? If it did, the judgment of the district magistrate is correct. If it did not, the judgment is erroneous, and under the stipulated facts judgment should have been entered in favor of the plaintiff for \$75 and costs.

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Fish in public waters, like animals *ferae naturae*, belong to the public, in which individuals, as such, have no property interests so long as such fish are in public waters. However, when one captures fish in the public waters and confines them in a private pond, disconnected from the public waters, he acquires an absolute property in them, subject to be divested only by their escape, and another taking them from his possession is liable to him for their value. It is true that fish in a pond, although confined and subjected to the dominion of the one exercising dominion over the pond, are in their natural element. Fish are incapable of existing out of water. This, however, does not make them appurtenant to the pond or place wherein they may be confined, as they may be removed from such pond or other waters without injury to the pond where first confined. And so of animals, wild by nature, confined in a park or close where they find grass and other vegetation upon which to feed, but which they may find elsewhere when removed. The leasehold in question is analogous to a leasehold of a house for mercantile purposes, in which the lessee conducts a store. His stock of merchandise does not become appurtenant to the house or lands upon which situated nor is it appurtenant to his leasehold interest in the realty, and consequently does not pass with such leasehold under an execution sale of the leasehold. In such case the merchant leases the building for certain uses, that is, a place to keep his goods for sale. In case of a levy of an execution upon his leasehold interest, and sale thereof, nothing being said about his stock of merchandise in the building leased, it could not well be contended that such levy and sale carries with it, *ipso facto*, the stock of goods in the building, or that the execution defendant might not within a reasonable time after such sale remove his goods. In the case at bar the pond was leased for certain uses, "the raising of pond mullet for the market." One of the agreed facts is that the lessee who sold the fish to plaintiff "was acknowledged to be the owner thereof, except for the levy and sale." This stipulation negatives the idea that the

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fish were in the pond at the time of the execution of the lease, as otherwise the lessor would have been the owner of the fish, subject only to the right of the lessee to take the same under his lease (19 Cyc. 989, 990). The natural inference from the agreed facts is that plaintiff's vendor caught the fish and placed them in the pond for the purpose of growing them for market. It is well established that no personal property passes under an execution sale unless it was seized in levying an execution, actually or constructively, under a levy of such execution, and without such seizure a sale under execution does not pass title to the property attempted to be sold under the execution (*Ferry v. Hakalau Plantation Co.*, 21 Haw. 745). At the common law a leasehold interest was regarded as a chattel, and a levy of an execution upon the leasehold was required to be made as upon other chattels with the exception that the officer making the levy need not take actual possession of the property leased (*Freeman on Executions*, 3rd ed., §119; 11 Am. & Eng. Ency. L., 2nd ed., p. 653, note and authorities cited; 17 Cyc. 953, and authorities cited in note 50; 8 Ency. Pl. & Pr. p. 550).

In the case at bar the levy was upon the leasehold and no mention whatever was made of the fish in the levy, notice of sale, or sheriff's bill of sale, all of which merely described the lease of the fish pond. We are of opinion that the execution sale did not pass the title to the fish any more than an execution sale of a peddler's cart would pass the title to goods and wares in the cart not mentioned in the levy, notice and certificate of sale. We think the conclusion inevitable that the fish in the pond did not pass with the execution sale of the leasehold. The fact that mullet in ponds having no outlet to the sea will not propagate is so well known that the court takes judicial notice of such fact. Such ponds are used for the purpose of growing mullet which are taken in the sea while young. The fish are thus reclaimed and become private property, and as such the owner thereof is protected in his usufruct. It is not a privilege of fishing or taking fish from a pond that was granted by the

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lease in question, but an estate for years in the realty, and in this particular the case at bar is unlike those cases where a right of fishery is an appurtenant or an easement to an estate in land, absolute or limited, and, as such, necessarily passes with the dominant estate. A grant or license to take fish from private owners is not uncommon, and, by custom, rights of fishery may be appurtenant to an estate in lands. A case that has frequently occurred is where a riparian owner leases lands through which a non-navigable stream runs, the lease carrying with it the exclusive right of fishery belonging to the riparian owner unless there is in the lease a reservation of such right to the lessor. The reported cases involving the question whether the right to take fish passes with the lease of lands apply to cases where the fish propagate in the waters upon said lands and not to a case like the one at bar where the pond is used for the purpose of growing fish caught in the sea.

We are of opinion that under the agreed statement of facts that the fish in the pond leased to the vendor of plaintiff did not pass by the execution sale and that the judgment should have been in favor of the plaintiff for \$75, the agreed value of the fish appropriated by the defendants.

In arriving at this conclusion we do not desire to be understood as holding that plaintiff was not under the duty of removing the fish from the pond within a reasonable time—with reasonable promptness—after the execution sale, or as holding that he could burden the purchaser at such sale with the keeping of the fish in the pond. Under the agreed facts the defendants took the said fish from the pond within a period of from one to nineteen days, and we are unable to say that the plaintiff abandoned the fish and thereby lost title.

The judgment is reversed and the cause remanded to the district court of Molokai with instructions to enter a judgment in favor of the plaintiff for the sum of \$75 and costs.

E. Murphy for plaintiff.

D. H. Case and *E. Vincent* for defendants.

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H. HACKFELD & COMPANY, LIMITED, v. INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED JULY 19, 1915.

DECIDED JULY 20, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

JUDGMENTS—*estoppel—res judicata.*

Where a demurrer has been sustained because of the omission of the plaintiff to set forth in his complaint an allegation material to the cause of action attempted to be stated the judgment of dismissal will not be a bar to a fresh action the complaint in which includes the allegation previously omitted.

PLEADING—*ultimate facts—knowledge.*

In pleadings it is necessary to allege only ultimate, as distinguished from evidential, facts. An allegation that a party had knowledge of a certain matter or thing is an allegation of an ultimate and traversable fact.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is an appeal from a judgment of the district court of Honolulu sustaining the plea in bar of the defendant to the plaintiff's complaint. On January 4, 1915, the plaintiff filed an action against the defendant in the district court claiming damages for injury sustained by a horse of the plaintiff by reason of the defective condition of a certain pier at Honolulu upon which the horse had been driven at the direction of an employee of the defendant. A demurrer to the complaint was sustained. The plaintiff amended its complaint and a demurrer to the amended complaint was sustained and the case was dismissed. On February 16, 1915, the plaintiff commenced a new action in the same court by filing a complaint which was substantially like the amended complaint in the first action except that it contained the additional allegation that the defective condition of the pier "was such that the defect was known or should

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have been known to the defendant." To this complaint the defendant interposed a plea in bar setting up the judgment of dismissal in the first action. Counsel for the defendant contend that the new allegation "is a mere argumentative statement of the pleader," "a mere claim unsupported by any allegation of fact from which a legal presumption of knowledge might be drawn," and that "not a single new fact is pleaded." Counsel seem to concede that knowledge of the defective condition of the wharf would, properly pleaded, be a material and necessary allegation in the complaint. On the assumption that the new allegation added nothing to the cause of action attempted to be shown in the first case, and that "the case is precisely the same as before on the facts," it is argued that the new complaint fails to state a cause of action against the defendant. Whether the new allegation is duplicitous, and whether the complaint as a whole would have withstood a general demurrer are questions not presented by this appeal. We are dealing here with a plea in *res judicata*, not a demurrer to the complaint.

The rule applicable here is that where a demurrer has been sustained because of the omission of the plaintiff to set forth in his complaint an allegation material to the cause of action attempted to be stated the judgment will not be a bar to a fresh action the complaint in which includes the allegation previously omitted. *Gould v. Evansville etc. R. Co.*, 91 U. S. 526, 534; *Cromwell v. Sac*, 94 U. S. 351, 364. See *Archer v. Naka*, 19 Haw. 547.

An allegation that a party had knowledge of a certain matter or thing is an allegation of an ultimate and traversable fact, and not of a conclusion of law. 31 Cyc. 58; *Voiles v. Beard*, 58 Ind. 510; *State v. Sooy*, 39 N. J. L. 135, 149; *Neilson v. Edwards*, 148 N. W. (S. D.) 844, 847. "In pleadings it is necessary to allege only ultimate, as distinguished from evidential, facts." *Brown v. Cornwell*, 20 Haw. 457, 465. We find, then, that the complaint in the second case does contain an allegation of a fact necessary and material to the plaintiff's claim

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which was not contained in the complaint which, in the first case, was held bad upon demurrer. Upon the principle of *res judicata* which is applicable to the circumstances of this case the judgment in the former case is not a bar to the maintenance of the new case.

The appeal is sustained and the case is remanded to the district magistrate with the direction to overrule the plea in bar.

C. S. Franklin (*Thompson & Milverton* on the brief) for plaintiff.

L. J. Warren (*Smith, Warren & Sutton* on the brief) for defendant.

OAHU RAILWAY & LAND COMPANY v. KOLOHANA
KAILI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. T. B. STUART, JUDGE.

ARGUED JUNE 21, 1915.

DECIDED JULY 27, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

ADVERSE POSSESSION—*declarations of person in possession—res gestae.*

In an action of ejectment, the defense being adverse possession, the declarations of the party in possession of the land as to the nature of his claim are admissible as part of the *res gestae* and as tending to prove hostility of claim, but statements as to the source of claim or manner of acquiring the possession, being narrations of past transactions, are not so admissible.

SAME—*declarations made after expiration of statutory period of limitation.*

It is no objection to evidence of declarations admissible as part of the *res gestae* that they were not shown to have been made before the expiration of the statutory period of limitation.

SAME—*evidence sustaining burden of proof of hostility of claim.*

Where one is shown to have been for the statutory period in actual, open, notorious, continuous and exclusive possession of land, apparently as owner, and such possession is unexplained, the presumption is that such possession was hostile.

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SAME—*acceptance of lease by party claiming title by adverse possession from disseizee.*

The rule is that while a recognition of title of the true owner by the one who has acquired title to land by adverse possession upon the completion of the statutory period will not alone defeat the title so acquired such recognition is evidence to be considered in determining whether the prior possession of the adverse claimant was in fact adverse.

SAME—*continuity of possession—recognition of superior title.*

Interruption of the continuity of possession occurs when the adverse claimant recognizes the title of the true owner.

EVIDENCE—*instruments requiring to be stamped.*

The admission in evidence of an unstamped instrument required by law to be stamped, where it has been used by the trial court as the basis of a finding of fact or conclusion of law, is error.

APPEAL AND ERROR—*jury waived case—erroneous admission of evidence.*

Reversible error appears where it is shown that the decision of the circuit court in a jury waived case was based partly upon assumed facts of which there was no evidence or which were attempted to be shown only by evidence improperly admitted over objection, and the evidence on the main issue was conflicting.

SAME—*exceptions in jury waived case.*

Exceptions, in a jury waived case, to an oral decision of the court, and to the overruling of a motion for a new trial which was made before the written decision was filed, present nothing for the consideration of the appellate court.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Quarles, J., dissenting.)

This is an action of ejectment in which the plaintiff seeks to recover the possession of a parcel of land containing an area of 3.27 acres, situate at Honouliuli, city and county of Honolulu. The plaintiff proved the paper title to the land showing title in itself under a lease for a term of fifty years commencing January 1, 1890, made by James Campbell, as lessor, to B. F. Dillingham, as lessee, dated November 19, 1889, and assigned to it on December 12, 1889. The assignment reserved certain portions of the demised premises, including the land in dispute, the portions reserved having been released to the plaintiff by quitclaim deed dated March 23, 1892. The defense was adverse

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possession based on and following an alleged parol exchange of lands between Campbell and a woman named Kamai in 1878 or 1879. Kamai married the defendant in 1908, and died in 1912 leaving the defendant as her sole surviving heir. The case was tried jury waived and decided in favor of the defendant. The plaintiff brings exceptions.

Exception 2. The defendant was allowed to testify over the objection of the plaintiff that Kamai "told me that she made an exchange with Mr. James Campbell in which she got this land now in dispute." The testimony was admitted upon the theory that it was within the well established exception to the rule against hearsay in favor of *res gestae* declarations. It is settled in this Territory, in accordance with the rule in most of the States, that the declarations of a person in possession of land as to the nature of his claim go to characterize his possession, are part of the *res gestae*, and tend to prove the hostility of claim necessary to an adverse holding. *Carter v. Lulia*, 16 Haw. 630; *Makekau v. Kane*, 20 Haw. 203. But it is also well settled that declarations which are but narratives of past occurrences are not admissible as part of the *res gestae*. 16 Cyc. 1258; 1 Greenleaf on Evidence, Sec. 110. Declarations which are but statements as to the source of claim or manner of acquiring possession of land are narrations of past transactions and are not to be considered as merely characterizing the possession and, therefore, not of the *res gestae*. 24 A. & E. Enc. Law (2nd ed.) 691; *Daffron v. Crump*, 69 Ala. 77, 80; *Ray v. Jackson*, 7 So. (Ala.) 747; *Whitaker v. Whitaker*, 157 Mo. 342, 354; *Swope v. Ward*, 185 Mo. 316, 329; *Samaha v. Mason*, 27 App. Cas. (D. C.) 470, 477; *Murray v. Cone*, 26 Ia. 276; *Crawford v. Crawford*, 60 Kan. 126; *Feig v. Meyers*, 102 Pa. St. 10, 16. And see *Makekau v. Kane*, supra. Accordingly it was held in *Wilkinson v. Bottoms*, 56 So. (Ala.) 948, that evidence of a declaration that there had been a parol exchange of lands was inadmissible. Though there are cases in which a contrary view has been taken, the application of the rule in accordance with the cases cited

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would seem to be the logical and consistent one. It is not at all necessary, in establishing a title by adverse possession, to prove that declarations were made by the person or persons in possession of the land, and no good reason is perceived why the rule as to *res gestae* should be relaxed or extended in cases of this kind. This exception is sustained.

Exceptions 3, 4 and 5. These relate to the admission in evidence of certain leases of portions of the land in dispute claimed to have been made by Kamai, as lessor, and offered evidently for the purpose of showing acts of ownership and claim of title by Kamai. The plaintiff objected to the admission of the documents because they were not stamped. The statute (R. L. 1915, Sec. 1352) provides that "No instrument requiring to be stamped shall be * * * of any validity in any court of this Territory unless the same shall be properly stamped." Leases are required to be stamped. It is the duty of the trial judges to heed and give effect to this mandate of the legislature. This court probably would not reverse a judgment of the circuit court because of the admission in evidence of an unstamped instrument, which the law requires to be stamped, where it had not been used as a basis for any finding of fact or conclusion of law; but here, the record shows, the leases in question were considered by the court and entered into its conclusion that the defense of adverse possession had been made out. Thus they were given validity in violation of the statute. Under the statute the leases were not evidence, and the court's considering them as such was error. This court has not heretofore been called upon to construe or apply the statute, though in the case of *Makainai v. Goo Wan Hoy*, 14 Haw. 607, which involved the federal war revenue tax of 1898, the refusal of the trial court to admit in evidence certain promissory notes which were not properly stamped was sustained. These exceptions are sustained.

Exceptions 7 and 10 relate to the admission of the testimony of the defendant and another witness to the effect that Kamai, while in possession of the land in dispute, stated to them that

the land was hers. The testimony was properly admitted as declarations characterizing the possession, and of the *res gestae*. *Carter v. Lulia*, supra. It is no objection to the admissibility of such declarations that they were not shown to have been made before the expiration of the statutory period of limitation. *Canon v. Stockmon*, 36 Cal. 535, 541. These exceptions are overruled.

Exceptions 20 and 21, which were to the decision and judgment on the grounds that they were contrary to the law and the evidence, and which involve also exceptions 6, 8, 9, 11, 12, 13, 14 and 15, relating to the admission of testimony as to the leasing of the land and the payment of taxes by Kamai, may be considered together. On the question of the defendant's claim of title by adverse possession the court, in sustaining it, took into consideration, besides the facts of open and notorious possession of the land by Kamai for more than twenty years, which was the period of limitation at the time referred to, and the making of improvements by her, the facts that she "claimed she got it by an exchange with Campbell," that "she paid the taxes—her husband says that she paid the taxes all the time," that "she did bring in a few (tax) receipts," and that "she leased the land frequently."

The contention of counsel for the plaintiff that where there is no direct evidence that the possession of one of the land of another was hostile in its inception it must be presumed to have been in subordination to the title of the true owner is not sustained. Actual, open, exclusive and continuous possession of land by the claimant, apparently as owner, is evidence of a hostile entry and claim. *Kapiolani Estate v. Cleghorn*, 14 Haw. 330, 337. The rule was thus stated in the case of *Albertina v. Kapiolani Estate*, 14 Haw. 321, 325, "While it is true that the burden is on the party affirming the existence of adverse possession to show that his possession is in fact adverse, it is also true that where one is shown to have been for the statutory period in actual, open, notorious, continuous and exclusive possession,

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apparently as owner, and such possession is unexplained, either by showing it was under a lease from, or other contract with or otherwise by permission of the true owner, the presumption is that such possession was hostile."

But, as above pointed out, the evidence of Kamai's declaration that she had acquired the land through an exchange with Campbell was improperly admitted, and there was no other evidence of such an exchange. The declaration should not have been regarded by the court as tending to support the defendant's claim. The fact that a parcel exchange had been made, if it was a fact, could have been proven by proper evidence, but not by a hearsay statement. Payment of taxes may be shown in support of a claim of title to land by adverse possession. *Paulo v. Malo*, 6 Haw. 390. And we assume that the payment of taxes may be testified to by any one cognizant of the facts. But over the objection of the plaintiff the defendant was allowed to testify that Kamai paid taxes on the land though it did not appear that he was cognizant of the facts, and he admitted that he did not know how long or how often she paid them. The tax records which were put in evidence did not show that Kamai had been assessed for taxes on the land in dispute, and there was evidence in the case tending to show that she owned other land. The defendant did not testify, as the trial court found he did, that Kamai "paid the taxes all the time." No receipts for taxes paid were produced. The finding of fact that Kamai paid the taxes on this land was not supported by the evidence. The leases made by Kamai, above referred to, bore dates in the years 1908, 1911 and 1912, and, pursuant to a provision contained in a lease made between the plaintiff and Kamai in 1902 (which will be adverted to presently) the rents were collected from the tenants by the plaintiff, one-half thereof being retained by it as rental payable by Kamai under her lease, the other half being paid over to Kamai. These facts, which were undisputed, did not support the finding made by the trial court that "the lessees are all in possession acting under her as the owner of the land."

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The defendant testified, over objection, that Kamai made some leases prior to those allowed in evidence, but it did not appear when they were made or whether the plaintiff collected and shared the rents. Whether the fact that Kamai had made other leases would tend to support the contention that her possession was under claim of title in fee in herself would depend upon the circumstances as to the time when and the conditions under which they were made. The documents were said to have been lost and their contents were not before the court. The bare fact that Kamai had made leases was therefore irrelevant. As above stated, the court based its decision partly upon the fact that Kamai had made leases of the land.

In a jury waived case the improper admission of evidence which does not appear to have been relied on by the trial court in arriving at its conclusion, the decision being amply supported by other evidence, will not ordinarily require the reversal of the judgment. *Aiona v. Ponahawai Coffee Co.*, 20 Haw. 724, 728. But reversible error appears where, as here, the decision of the court was based partly upon assumed facts of which there was no evidence in the case or which were attempted to be shown by evidence improperly admitted over objection, and the evidence on the main issue was conflicting.

The plaintiff introduced in evidence in rebuttal a lease of the land in dispute from the plaintiff to Kamai dated December 29, 1902, for the term of her natural life. The circuit court refused to consider it as evidence in the case, holding that as the statute had previously run in Kamai's favor, it was void for want of consideration, and said that if necessary it would hold it "void for fraud on the part of Von Holt," the plaintiff's agent. There was no evidence of fraud on the part of the agent of the plaintiff who negotiated the lease in its behalf. The rule is that while a recognition of title of the true owner by the one who has acquired title to land by adverse possession upon the completion of the statutory period will not alone defeat the title so acquired, "such recognition is evidence to be considered in

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determining whether in fact the prior possession of the adverse claimant was in fact adverse or a possession in subordination to the title of the true owner." 2 C. J. 102; *Sage v. Rudnick*, 67 Minn. 362; *Walling v. Eggers*, 104 S. W. (Ky.) 360; *Barrett v. McKinney*, 93 S. W. (Tex.) 240. The court below erred in not considering the lease in question in that connection at least. These exceptions are sustained.

Counsel point out that there was evidence in the case given by Von Holt, and uncontradicted by any other evidence, that at a time when the plaintiff contemplated using this land for its own purposes, Kamai had asked and was granted permission to continue to live on the land and to rent to others a portion of it which she did not need for her own use, and they contend that she thereby recognized the superior title. Continuity of possession is, of course, one of the essential requirements in a claim of adverse possession. *Leialoha v. Wolter*, 21 Haw. 624. And "Interruption of the continuity necessary to acquire title by prescription occurs when the adverse claimant recognizes the title of the disseizee." 2 C. J. 101; *Campau v. Lafferty*, 43 Mich. 429; *Olson v. Burk*, 94 Minn. 456; *Williams v. Scott*, 122 N. C. 545; *McMahill v. Torrence*, 163 Ill. 277; *Paton v. Robinson*, 81 Conn. 547, 551; *Browneller v. Wells*, 109 Iowa 230; *Jackson v. Cuerdon*, 2 Johns. Cas. 353. But the terms of the alleged arrangement, the time when it was made, whether it amounted to a recognition of title, and the authority of Von Holt in the premises (for it seems as though the title was in Dillingham at the time) were left in much uncertainty. The witness was not closely examined on the subject. If there were nothing else in the case requiring a reversal the judgment could not be disturbed on this point.

Exceptions 17 and 18, to the "oral" decision of the court, and exception 19, to the overruling of a motion for a new trial which was made before the written decision was filed, present nothing for the consideration of this court. See *Nahaolelua v. Heen*, 20 Haw. 613, 616.

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The remaining exceptions require no comment. They are overruled.

The decision and judgment of the circuit court are vacated and set aside, and a new trial is granted. Case remanded.

A. M. Cristy (*Frear, Prosser, Anderson & Marx* on the brief) for plaintiff.

N. W. Ahuli (*E. K. Aiu* with him on the brief) for defendant.

DISSENTING OPINION OF QUARLES, J.

In my opinion the admission in evidence of the declaration of Kamai, made in her lifetime, to the effect that she received the land in controversy from James Campbell in exchange for other lands, was not error, or, if it was, was not prejudicial error, and not such as justifies the granting of a new trial. Many of the authorities cited on this point in the majority opinion do not relate to actions of this kind. 16 Cyc. 1258, referred to in support of the rule announced in the majority opinion, clearly relates to cases in which a contract relied on for a recovery was sought to be proven merely by the declaration of an interested party as to the substance of the contract. 24 A. & E. Enc. Law (2nd ed.) 691, cited in the majority opinion, says: "Declarations as to the source or manner of acquiring title, as, for instance, the contract under which title was acquired, are narrations of past transactions and are inadmissible." To sustain the text the author, in note 3, cites a large number of authorities which I have carefully examined. A careful reading of those authorities shows that a large majority of the decisions relate to the possession or title to chattels where a party claimed title, not by adverse possession but by gift or purchase from another, and the declaration of the donee or vendee was relied on to prove the sale or gift, which, of course, cannot be permitted. Two States have gone to the extent of holding that in ejectment where a party relies upon adverse possession and offers declarations of his predecessor made while in possession

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of the land as to his claim of ownership, a declaration that he got the land from the owner by purchase or exchange was inadmissible for any purpose, being a narration of a past transaction, viz., Alabama and Missouri. In *Dothard v. Denson*, 72 Ala. 541, which was a statutory action in the nature of ejectment, the court at page 544 said: "The declarations of Denson, that he bought the land from Pettitt, and of the price he paid, were inadmissible. The declarations of a party in possession of property, real or personal, explanatory of the possession, are received in evidence on the principle of *res gestae*.—1 Brick. Dig. 843, §§558-59. But his declarations merely narrative of past transactions, or respecting the source of the title, or the contract by which possession was acquired, are inadmissible.—*ib.*, 843, §560." This was followed in *Wilkinson v. Bottoms*, 56 So. (Ala.) 948. In *Whitaker v. Whitaker*, 157 Mo. 342, the declaration of a deceased cotenant was offered to show an ouster by him of other cotenants. The court at page 354, *inter alia*, said: "While the tendency of modern decisions is to admit explanations of the possessor of property as to his manner of occupancy, to show whether his possession was adverse or not under the statute of limitations, we think this evidence was clearly incompetent. It was nothing but an attempt to prove an acquisition of his brothers' and sisters' title by his own *ex parte* declarations." And in the same case (175 Mo. 1) the question again came before the court, and at page 6 it was said: "The evidence is practically the same now as before, except that Mr. Campbell, instead of testifying as above stated, was not examined as to what Dr. Whitaker said about his having acquired the interest of his brothers and sisters in the land, but he testified 'Dr. Whitaker claimed to own the farm after he moved on it.' This was objected to and it is claimed that it was incompetent under the opinion of this court on former appeal. This, however, is a mistake, for the testimony that 'Dr. Whitaker claimed to own the farm after he moved on it' is a very different thing from his saying that Dr. Whitaker said he had acquired the

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interest of his brothers and sisters. The latter was clearly a self-serving statement, while the former is clearly admissible as going to show the character of his possession, and therefore to sustain the plea of ten years' adverse possession." In *Swope v. Ward*, 185 Mo. 316, the Missouri cases, especially the two decisions in *Whitaker v. Whitaker*, *supra*, are discussed, and the court at page 329 said: "During the examination of several of the witnesses for the defendants, the witnesses, in speaking of Ward's claim of title or right, said Ward had told them that he had bought the land or that Campbell had given it to him. As hereinbefore pointed out, such evidence was inadmissible and such statements, not having been made in the presence of the title-owner, should have been excluded. But in view of all the evidence in the case, the admission of such evidence must be taken as harmless error, for the verdict of the jury could not have been otherwise than it was, even with such evidence out of the case." In the case at bar, if it be error to admit the declaration of Kamai that she got the land by exchange with Campbell for the sole purpose of showing that she held it under claim of her own right and in hostility to Campbell's title, such error was harmless as the evidence shows that she held by actual enclosure, residence and occupation, and claimed the land as her own for a period of more than twenty years continuously, and the title is not claimed by the defendant by reason of the oral exchange between Kamai and Campbell, but by reason of twenty years' adverse possession—by operation of law—hence the admission of this declaration could not have injured the plaintiff. This is especially true in the case at bar inasmuch as the case was tried by the court without the intervention of a jury, and the real basis of the decision in favor of the defendant and against the plaintiff is that Kamai, the deceased wife of the defendant, acquired a perfect and complete title to the land, not by exchange with Campbell, but by continuous, open, notorious, visible, adverse possession for the requisite time. The reference in *Makekau v. Kane*, 20 Haw. 203, to the exception to the rule

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in regard to declarations, that they must not relate to past transactions, was made, as a reading of the decision in that case shows, principally upon the authority of the decision in *Knight v. Knight*, 178 Ill. 553, 557. In the *Knight* case the Illinois court at page 556 said: "The court permitted appellees to put in evidence declarations of their ancestor while he was in the possession and control of the property after the execution and delivery of the deed to appellant, such declarations being, in effect, bare assertions of ownership of the premises. There seems to be a unanimity in authorities that declarations are admissible when accompanying an act of possession which is provable. The declarations in such instances are regarded as part of the act, or a 'verbal act' indicating present purpose or motive. Whether, to be regarded as admissible in evidence, the declaration must be shown, in such cases as this, to be contemporaneous with some distinct and particular act of possession has been questioned by respectable authorities. The fact here involved is possession of the premises for the prescribed period of time under claim of title. Actual possession for that period is in the nature of a continuous act, and the better view is, that particular acts of dominion over the property, and the declarations of the possessor, while in possession, are of the *res gestae* of the fact involved and hence equally admissible as evidence" (citing *Duffy v. Presbyterian Congregation*, 48 Pa. St. 51; *Recard v. Williams*, 7 Wheat. 59; *Austin v. Allen*, 6 Wis. 134; *Rocke v. Andrews*, 26 Wis. 311; *Stockton Savings Bank v. Staples*, 98 Cal. 189; *Amick v. Young*, 69 Ill. 542; *James v. Ind. & St. L. R. Co.*, 91 Ill. 554; *Shaw v. Schoonover*, 130 Ill. 448; *Grim v. Murphy*, 110 Ill. 271; *Ill. Cent. R. Co. v. Houghton*, 126 Ill. 233; *Shaw v. Smithes*, 167 Ill. 269; 1 Greenleaf on Evidence, §§108, 109). In *Cannon v. Stockmon*, 36 Cal. 535, 541, it is said: "Acts and declarations of the party respecting his claim, at any time while in possession before commencement of the action, whether within or after five years (the statutory time in California) after the commencement of his possession.

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would be admissible as tending to show the character in which he claimed during the whole time, but the question as to whether there had been, at any time, a continuous adverse possession of five years, must be determined by the jury from all the evidence bearing upon the question." A parol exchange of lands and a parol gift of lands, followed in each instance by continuous possession for twenty years, will defeat an action of ejectment by one holding the paper title (*Ekalia, Guardian, v. Kopaea*, 4 Haw. 198; *Macfarlane v. Damon*, 10 Haw. 495). The declarations of Kamai, introduced in evidence, were made while in possession, did not relate to a past possession which she had surrendered, and were admissible, not to prove title but to show the nature of her claim and that it was not under Campbell but in hostility to the title of Campbell. I am clearly of opinion that the true rule, even if this case had been tried by a jury instead of by the court, jury waived, is correctly expressed in *Swope v. Ward*, supra, where the Missouri court held a similar declaration as harmless error and refused to set the verdict aside and grant a new trial on the ground that there was an abundance of evidence to establish title by adverse possession regardless of such declaration. That is true in this case, as I shall endeavor to point out later in this opinion.

In regard to exceptions 3, 4 and 5, I agree with the majority that the admission of the three leases, upon which revenue stamps had not been placed, constituted error. I am also clearly of the opinion that it was harmless error inasmuch as it is apparent from the whole record that they were simply introduced to show acts of dominion over the property by Kamai in using it through tenants, and that the leases were not offered or received for the purpose of proving their contents,—a matter not in issue,—but simply to show that she had leased. These leases were given long after title had vested in Kamai by continuous adverse possession and were immaterial as to the main question of adverse possession, and it is apparent that they were not received as substantive evidence showing the acquisition of

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title by adverse possession,—the main issue in the case. If the defendant desired to introduce them he should have had them stamped, as he is authorized to do by Sec. 1352, R. L. It is palpable from the entire record in this case that the decision and judgment in favor of the defendant did not rest in whole or in part upon these leases, therefore their reception in evidence was clearly harmless error. Not being prejudicial error a new trial is not authorized by reason of the admission of these leases in evidence (*Kapiolani Estate v. Thurston*, 17 Haw. 312; *Makekau v. Kane*, 20 Haw. 203).

Touching exceptions 20 and 21, which challenge the correctness of the decision and judgment on the ground that the decision and judgment were contrary to law, contrary to the evidence, and contrary to the weight of evidence, I am clearly of the opinion that these exceptions should be overruled. The trial court found from the evidence that Kamai, the predecessor of the defendant, took possession of the land in dispute in 1878, occupied it, fenced it, built a substantial house on it, lived on it continuously up to the time of her death, leased and released portions of it, and acquired title by adverse possession prior to 1902; that in 1902 the agent of the plaintiff procured her signature to a lease under which she was to occupy the land, rent free, and she was to lease whatever of it she desired and to receive half of the rents; that said lease expressed the nominal consideration of a rent reserved of \$1 per annum, but was wholly without consideration and void. The court found the title to be in the defendant and ordered judgment accordingly, which was entered. In my opinion there is abundance of evidence in the record showing that prior to 1902, the date of the lease from plaintiff to said Kamai, Kamai had by continuous, open, notorious, peaceable, adverse possession of the land in dispute acquired title thereto. Mr. Von Holt testified that Kamai was an old retainer of the Meeks before Mr. Campbell got the land; that she was living in the house upon this land with Charlie Liilii who was Mr. Campbell's head cowboy. The defendant

testified that he was 49 years of age and had lived all his life at Honouliuli; that Kamai, whom he later married, lived there all the time; that she had lived on another piece of land, but later, while her foster-son, Arthur Kalehua, was a baby, and soon after he was born, moved to the land in dispute and declared while living on it that it was her own; that she claimed it as her own and that she had got it from James Campbell by exchange. Arthur Kalehua testified that he was born in 1878 at Honouliuli; that Kamai was his foster-mother; that he lived with Kamai from his childhood up to the time of her death; that she lived on the land in dispute during all the time; that he was told that he was one year old when Kamai moved on the land; that Kamai cultivated the land,—raised taro and flowers—and leased parts of it to tenants who cultivated taro and rice on it; that Kamai never lived anywhere else except on this land while he knew her, and that she died on the land in dispute. This evidence would have justified a jury, and did justify the court, in finding that Kamai had held adverse possession of the land in dispute for more than twenty years prior to the lease from the plaintiff in 1902; that she held possession with the actual knowledge of the owner of the fee, James Campbell, is apparent from the evidence, as he is shown to have stopped at her house on this land at times when they were making cattle drives. But it is argued that circumstances tend to show that her possession was permissive inasmuch as she lived with Charlie Liilii as his mistress on this land, and Charlie Liilii was in the employ of Campbell; that after Charlie Liilii left the premises and went to work on an adjoining cattle ranch, at Waipio, Kamai lived on the land with the defendant for quite a while before she was married to him, the defendant being during the time a cowboy in the employ of Mr. Von Holt (agent for plaintiff), hence her possession must be considered as permissive. It is also contended that the evidence of Mr. Von Holt proves that the continuity of her adverse possession was broken by her requesting Von Holt to permit her to remain on the land before

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she had occupied it the requisite time under the statute to give her a title by adverse possession. In my opinion this contention cannot be sustained under the evidence in this case. Von Holt did testify to a conversation with Kamai in which he claimed that she asked permission to remain on the land. Whether that was before or after the expiration of the twenty years' possession by Kamai and the vesting of title in her by adverse possession, I do not regard as important. The trial court found that Kamai had occupied the land from 1878. The evidence abundantly sustains the proposition that she was on the land as early as December, 1879; that she fenced it and built an expensive house upon it, as found by the trial court, is also shown by the evidence. Now, when did she have the conversation with Von Holt, and what was that conversation? I quote the following from the testimony of Von Holt by question and answer: "Q. Did you have any—did you take any steps to define Kamai's occupation while you were in charge of the ranch property? A. Not until after Charlie Liilii left the employ of the company and went to work on a different ranch. Q. At what time was this? A. It is rather indefinite in my mind just how long he worked but I should judge that he probably was on the land maybe a year after the railroad took possession of the land." And further on Mr. Von Holt, being asked to explain the conversation which he had with Kamai and about which he had testified, said: "After Charlie Liilii left the employ of the railroad company, I went to Kamai and asked her what she intended to do—whether she intended to follow Charlie Liilii to Waipio. She said no, that they were pau, which is Hawaiian for finished, and I asked her if she proposed continuing to live in that house—she said that she would like to continue living there because she had no other place to go to." Now that conversation, as detailed by Von Holt, is not to my mind sufficient evidence that Kamai asked permission to remain there or recognized the title of the railroad company by the lease under which it claims. This conversation is vague and indefinite, but

at the same time it rebuts the theory of the plaintiff that Kamai was there by permission, and was in the house simply for the reason that she was consorting with the head cowboy of Campbell, afterwards in the employ of plaintiff. She was unwilling to give up what she regarded as her home and her land and to follow Charlie Liilii to another ranch. Her actions from the time she took possession of it are absolutely inconsistent with any other theory than that she regarded the land as her own, claimed it as her own, treated it as her own, and did not recognize title in any one else. An old, and probably ignorant, Hawaiian woman, under such circumstances, might well say that she wanted to continue living on the land in dispute, using the language attributed to her by Von Holt and quoted above, without admitting or recognizing that any one else, other than herself, owned the land. So I am clearly of opinion that the continuity of her adverse possession was not broken by this conversation between her and Von Holt, which must have occurred in 1891 or 1892. The time of the delivery of the lease from Campbell to Dillingham is not definitely fixed by the evidence, and no presumption that it was delivered before the date on which it was recorded, in the absence of positive testimony, should be indulged. That lease bears date November 19, 1889, was acknowledged November 22, 1889, and was filed in the registrar's office February 17, 1890. As shown in the majority opinion the release of Dillingham's interest, if any, in and to the premises in dispute, to the railroad company, was made by quitclaim deed. This quitclaim deed was dated and acknowledged March 23, 1892, and filed for record March 25, 1892. Whether the railroad company (the plaintiff) took possession before or after it succeeded to the title of Dillingham to the Campbell lease is not clear from the entire evidence, so far as the fifteen acres reserved is concerned. It is, however, reasonably certain, and no other inference can be drawn from the evidence than that the plaintiff never attempted to exercise dominion over the land in dispute prior to the time it received the

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quitclaim deed from Dillingham in 1892. I do not regard the fact that Kamai lived with Charlie Liilii, or that defendant prior to his marriage to her, or the employment of either of them as cowboys for Campbell or for plaintiff, as sufficient evidence to support a conclusion that she was on the premises by permission and recognizing the title of either Campbell or the plaintiff to the premises in dispute.

As to payment of taxes by Kamai, the fact that she paid on this identical land may be proven and was proved by parol evidence in this case. "The fact of the payment of taxes may be shown by the receipt or certificate of the collector of taxes or other officer authorized to receive them, or by entries in the books and official records of the tax office or by any other competent evidence sufficient to satisfy a jury, including parol testimony, according to the doctrine prevailing in many states, although in some such testimony is not admissible unless the failure to produce a receipt or record evidence is first satisfactorily accounted for" (37 Cyc. 1167, 1168). Proof of the payment of taxes may be made by parol evidence the same as the payment of money in other cases, although receipts may have been given. *Hinchman v. Whetstone*, 23 Ill. 108, 111. The fact as to the payment of taxes is merely a circumstance tending to show the nature of the claim of Kamai, and while the same was of but little persuasive force in this case owing to the abundance of proof to show her adverse possession for twenty years or more by other evidence, it was admissible.

As to the lease from the railroad company to Kamai in 1902, it is not held, and could not successfully be contended, that the lease divested Kamai of title to the land, if she had acquired it. Did it estop her or her successor (the defendant) from asserting title to the land? It should be borne in mind that she did not receive possession of the land from the plaintiff and that no stated rent other than the nominal sum of one dollar per annum is mentioned or reserved in the lease. The trial court found from all the evidence that there was no considera-

tion for the lease as a matter of fact and of law, and that finding seems to be correct. The manner in which that lease was procured does not seem to strike the trial judge with much favor nor am I impressed with the justness and fairness of the manner in which it was procured. According to the evidence of Mr. Von Holt it took him a long time to talk this aged Hawaiian woman into accepting this lease, and in order to do so he had to call to his assistance a Hawaiian attorney,—a man of her own race, who by means which were not fully shown in the evidence did succeed in getting her to sign it. The facts and circumstances, and her actions, before and after, show, to my mind, conclusively, that she did not understand the lease or its effect as to her right to the land and her occupation and use of it. I find her, from the evidence in the case—from that of Von Holt and others—after the execution of this lease, renting portions of the land to others and collecting the rents, and expressing surprise on one or more occasions when tenants occupying a portion of it informed her that they had to pay the railroad company. There is not a particle of doubt in my mind that when that lease was accepted in 1902 by Kama'i she had been in the continuous adverse possession of the land under a claim of right for more than twenty years and had acquired a complete title to the land, and the title of James Campbell (and of the plaintiff under its lease from Campbell to Dillingham assigned to it, as to the lands other than fifteen acres including the land in dispute, which was later quitclaimed to plaintiff in 1892) had terminated by operation of law. The said lease was in law an admission of title in the plaintiff, but in law it was of no effect so far as passing title. "On the expiration of the limitation period the disseisor becomes possessed of a vested right or title, and that title relates back to the inception of his possession. He has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period. It cannot be lost by a mere abandonment, or subsequent legislation, or even by the acknowl-

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edgment of title in another" (1 R. C. L. §5, p. 690). One who has thus acquired title by adverse possession, or otherwise, is not estopped from claiming title to the land by accepting a lease thereof from another claimant, while he himself is in possession, and who has not at any time received the possession from the lessor and in subordination to the lessor (*Strong v. Baldwin*, 154 Cal. 150, 160; *Sage v. Rudnick*, 67 Minn. 362; *Towles v. Hamilton*, 94 Neb. 588; *Martin v. Martin*, 76 Neb. 335). Abandonment of the possession after the statute has fully run, or acknowledgment of title in another thereafter, does not divest one who has acquired title to lands by adverse possession of such title as by such adverse possession the title of the prior owner has been extinguished (*Allen v. Mansfield*, 82 Mo. 688; *Rennert v. Shirk*, 163 Ind. 542, 553; *Heinrichs v. Terrell*, 65 Iowa 25; *Sutton v. Pollard*, 96 Ky. 640; *Inhabitants etc., v. Benson*, 31 Me. 381; *Doe v. Fletcher*, 37 Md. 430; *Hodges v. Eddy*, 41 Vt. 485; *Austin v. Bailey*, 37 Vt. 219). Title procured by adverse possession for the requisite time under statutes of limitation is as effectual as if procured by grant and extinguishes the title of the prior owner (*Sherman v. Kane*, 86 N. Y. 57; *Second M. E. Church v. Humphrey*, 21 N. Y. S. 89).

At most it must be admitted that the evidence tending to show the acquisition of title by Kamai by continuous adverse possession is to some extent conflicting, but there being more than a scintilla of evidence and sufficient evidence to support the decision in favor of such adverse possession, this court has not, under numerous decisions, authority to set aside the decision and judgment in this case. The decisions to this effect and to the further effect that the decision of the court takes the place of a verdict of a jury are so unanimous and numerous in this jurisdiction, and in others, that it is useless to advert to them. To my mind the judgment is set aside in this case and a new trial awarded upon harmless errors, in part, but mainly upon the ground that the evidence is conflicting and that the trial court is not the sole judge of the evidence where it is con-

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flicting. In this jurisdiction that particularity and strictness in proving title by adverse possession, which, elsewhere obtains, does not obtain. Here slight evidence of adverse possession was, as early as 1884, held sufficient to establish title by adverse possession (*Mahukaliilii v. Hobron*, 5 Haw. 104). A new trial should not be granted for harmless error in the admission of immaterial evidence, nor on the ground that the evidence is conflicting when the gist of the main issue is substantially proven by the evidence.

In my opinion a new trial is not warranted in this case and is not authorized under the Hawaiian decisions, and the exceptions should be overruled.

M. OYAMA v. THOMAS B. STUART, AS THIRD JUDGE
OF THE CIRCUIT COURT OF THE FIRST JUDICIAL
CIRCUIT OF THE TERRITORY OF HAWAII,
AND M. KOMEYA, Y. ISHII, U. KOBAYASHI, T.
MITAMURA AND JOS. G. PRATT.

PETITION FOR WRIT OF PROHIBITION.

ARGUED JULY 15, 1915.

DECIDED AUGUST 2, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

PROHIBITION—when writ lies—proceeding without jurisdiction.

Prohibition lies to restrain the continuance of a receivership where the order appointing the receiver was beyond the power of the judge to make, even though the judge has jurisdiction of the subject matter of the suit in which the order was made.

SAME—remedy by appeal.

Prohibition does not ordinarily lie where the party may obtain relief by appeal, but where a void interlocutory order results in the seizure of property, and under the circumstances there is no other adequate relief for the party whose rights have been invaded, a case permitting the use of the writ appears.

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SAME—raising question of jurisdiction in lower court.

The question of jurisdiction should, as a general rule, be raised first in the lower court, but if the question has once been raised in the case and ruled on adversely, it need not be repeated in immediate connection with the order attacked.

RECEIVERS—ground for appointment—danger of loss or injury.

As a basis for the appointment of a receiver the plaintiff must show, not only that he has an interest in or right to the fund or property, but that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Quarles, J., dissenting)

On June 3, 1915, M. Komeya and others filed in the circuit court at chambers against S. Koshima and others a bill in equity in which the complainants prayed that the copartnership alleged to exist between the parties be dissolved, and that a receiver be appointed "to take charge of the property of the said partnership, and to collect assets thereof." Upon the filing of the bill, on the application of the complainants, and upon the averments contained in the bill, the circuit judge made an order appointing Joseph Lightfoot, Esq., as such receiver. This was done without notice to the defendants. On June 12, M. Oyama, one of the defendants (the petitioner here), filed a motion to vacate the order appointing the receiver upon the ground, *inter alia*, that said Lightfoot was the attorney for the complainants and therefore, was not a suitable or proper person to act as receiver. On July 1, Lightfoot was removed and Joseph G. Pratt, Esq., was appointed receiver in his place. In the meantime G. Nakamura, another defendant, filed his answer to the bill, and the defendant Oyama interposed a demurrer setting up, among other grounds, that "said bill is without equity upon its face and is utterly barren of allegation necessary and required to secure the cognizance of a court of chancery with respect to the prayer thereof" and that said bill "is vague, indefinite, uncer-

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tain and wholly insufficient to form a basis for the interposition of a court of equity." The demurrer was overruled. The present proceeding is a petition by M. Oyama for a writ of prohibition against the circuit judge in which the foregoing facts are recited, and it is alleged that the receiver has taken full charge and possession of the property of the copartnership, that the order appointing the receiver was made without authority or jurisdiction on the part of the judge, and that there is no equity in the bill upon which the order was based. The object of this petition is to prevent further proceedings in the cause. Upon the petition an order to show cause was issued, and the judge has filed his return to the petition in which he sets forth his view that he acted within the jurisdiction conferred by law upon circuit judges sitting in equity, and that if any error was committed it is to be corrected through the regular procedure of an appeal or writ of error. He also points out that "the order appointing Joseph G. Pratt was not objected to by petitioner or any one else, and no complaint has been made in reference thereto by motion or otherwise against the appointment so made of said Pratt."

In the bill of complaint it was, in substance, averred that the parties complainant and defendant were copartners engaged in the business of banking; that the defendant Nakamura was appointed president and manager of the bank; and the defendant Komeya was appointed cashier; that almost immediately after entering upon the management of the bank the said Nakamura began to lend large sums of money to his friends upon their unsecured promissory notes, and loaned at various times sums of money aggregating the sum of \$6000 to one Yamamoto (a defendant) well knowing him to be financially irresponsible and unable to repay the money loaned; that the said Nakamura borrowed from the bank, on his own unsecured note, the sum of \$16,328.85 upon which there remains unpaid the sum of \$13,328.85; that on or about February 28, 1912, the complainant Komeya and certain other members of the firm were obliged to

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neighborhood of \$19,000
positors; that since said
aid on presentation, the
been constantly compelled
as to deposit the same in
on March 21, 1912, the
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the partners, from time
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"The writ of prohibition

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lies to restrain any unauthorized proceedings by an inferior tribunal in a cause of which it has jurisdiction, as well as where the cause is without its jurisdiction." 2 Spelling, Ex. Rem. (2nd ed.) Sec. 1726; 32 Cyc. 605, 606; *Quimbo Appo v. People*, 20 N. Y. 531, 542; *State v. Dist. Court*, 22 Mont. 220, 233; *State v. White*, 24 So. (Fla.) 160, 168; *Gas Co. v. Holt*, 66 S. E. (W. Va.) 717; *Cronan v. District Court*, 15 Idaho 184. Under our statute (R. L. 1915, Sec. 2688) the writ lies when "the cause or some collateral matter arising therein" is beyond the jurisdiction of the court. And this court has held that the writ will issue to restrain the continuance of a receivership in a suit for the cancellation of a power of attorney, for discovery and accounting, where the object of the receivership had been accomplished, *Sumner v. Perry*, 11 Haw. 372; to restrain the punishment by contempt proceedings of the failure to comply with an order to pay temporary maintenance from which an appeal had been taken and was pending in a suit by a wife for maintenance, *Dole v. Gear*, 14 Haw. 554; to restrain the enforcement of a void order to pay alimony made in a divorce case, *Andrews v. Whitney*, 21 Haw. 264; and against the enforcement of an injunction in a suit for the specific performance of a contract against persons who, though joined as parties, had no interest in the subject-matter of the suit, see *Honolulu Athletic Park v. Lowry*, 22 Haw. 475, 477.

If the bill does not contain such averments as would be necessary to entitle the complainants to the principal relief sought, namely, the dissolution of the partnership, there was no legal ground for the appointment of the receiver. But even if a case for the dissolution of the partnership was shown, as to which we express no opinion, it would not necessarily follow that the facts averred justified the appointment of the receiver. "Upon a preliminary application for a receiver, the court does not determine the questions arising between the partners, the only question for consideration being whether, upon the facts disclosed, there is an apparent necessity for a receiver to protect

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the assets of the partnership until the rights of the partners can be definitely determined upon full hearing of the case." 5 Pom. Eq. Jur. Sec. 78. See also, High on Receivers (3rd ed.) Sec. 511; *Cox v. Peters*, 13 N. J. E. 39. As above shown, the circuit judge may have had jurisdiction of the suit, and yet have been without power to make the order in question.

As a basis for the appointment of a receiver, the plaintiff must show, not only that he has an interest in or right to the fund or property, but "that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant." 5 Pom. Eq. Jur. Sec. 64; 34 Cyc. 19. See *California Feed Co. v. Club Stables*, 10 Haw. 209, 214; *International Trust Co. v. Decker*, 152 Fed. 78, 82; *Warwick v. Stockton*, 55 N. J. E. 61, 66; *Aldrich v. Bag Co.*, 87 Atl. (N. J.) 65; *Gray v. Newark*, 79 Atl. (Del.) 739. It would, therefore, follow necessarily, in most cases, that a plaintiff in possession may not obtain the appointment of a receiver for it would be a rare case in which the plaintiff could say that property in his own possession is in danger of loss or injury through any preventable cause. See Smith on Receiverships, Sec. 192; *Smith v. Lowe*, 1 Edw. Ch. 33; *Buchanan v. Comstock*, 57 Barb. 568, 579. In the case at bar it appears that at the time the receiver was appointed the complainants were in possession of whatever property and assets the firm had, and there was no attempt made to show that there was any danger of any loss or injury thereto. An order appointing a receiver based upon a showing which, as matter of law, is insufficient, is in excess of the jurisdiction of the court. *Cronan v. Dist. Court*, supra. We are of the opinion that no legal ground for the appointment of the receiver was shown, and that the order of appointment was made without jurisdiction.

Prohibition does not ordinarily lie where the party may obtain relief by an appeal, "but it does not always follow that

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because the question of jurisdiction may be determined on appeal prohibition will not lie." *Union Feed Co. v. Kaaihue*, 21 Haw. 345, 351. Where a void interlocutory order results in the seizure of property, and under the circumstances there is no other adequate relief for the party whose rights have been invaded, a case permitting the use of the writ appears. See *St. Louis &c. R. Co. v. Wear*, 135 Mo. 230, 257; *Havemeyer v. Superior Court*, 84 Cal. 327, 397; *Cronan v. Dist. Court*, supra.

It is contended that the writ should not be granted because the petitioner did not present the question as to the power of the circuit judge to appoint the receiver Pratt to the court below. The rule of practice here invoked rests upon sound reason, and it should be enforced whenever the circumstances so warrant, as was the case in *Union Feed Co. v. Kaaihue*, supra. In the case at bar, one of the grounds advanced in the motion to set aside the order appointing Lightfoot as receiver was that "It appears from the bill in said case that the petitioners herein were in possession of the property of said copartnership when said order was made, and were in all things managing, conducting, and controlling the business and affairs of the said copartnership." This presented to the circuit judge the lack of the fundamental ground upon which a receiver could be appointed, namely, that there was danger of loss of or injury to the property of the firm. The motion to vacate the order was granted upon the ground that the receiver then appointed was not a disinterested and impartial person, but in appointing another receiver the circuit judge in effect ruled that the ground above stated was not well taken. We think it was not necessary that the point should have been presented again, and that the rule that the jurisdictional question should be first raised in the lower court was substantially and sufficiently complied with.

We hold that the order appointing Pratt as receiver was made in the absence of jurisdictional facts to support it, and, therefore, that it was beyond the power of the court to make. A

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writ prohibiting the continuance of the receivership is granted.

A. Perry and *A. S. Humphreys* for petitioner.

J. A. Magoon, and *J. G. Pratt*, *pro se*, for respondents.

DISSENTING OPINION OF QUARLES, J.

The only question arising in the original proceeding in this court for a writ of prohibition prohibiting the continuance of the receivership of Joseph G. Pratt as receiver for the banking partnership of which the petitioner and the respondents M. Komeya, Y. Ishii, U. Kobayashi, T. Mitamura and others were partners under the name of the Japanese Bank, is one of jurisdiction.

The bill of complaint filed by M. Komeya, Y. Ishii, U. Kobayashi and T. Mitamura against the other partners, S. Koshima, I. Yamamoto, M. Oyama, S. Kobayashi and G. Nakamura, respondents, on the 3d of June, 1915, in the circuit court of the first judicial circuit, alleged the organization of the partnership on the 19th day of May, 1909, for the purpose of carrying on a banking business in Honolulu under the name of the Japanese Bank; a capital of \$30,000 subscribed by each of the parties in amounts varying from \$500 to \$8,750; the appointment of the respondent G. Nakamura as president and manager of the said bank; that all of the partners, except G. Nakamura, were without experience in the banking business and implicitly relied upon G. Nakamura to conduct the same. The bill, without using the words "mismanagement" or "violation of duty," alleges that immediately after entering upon the management of the partnership business the said Nakamura began to lend large sums of money to his friends upon unsecured promissory notes and that he loaned one of the partners, I. Yamamoto, large sums of money, knowing the said I. Yamamoto to be financially irresponsible and unable to pay the said loans, taking the unsecured note of said I. Yamamoto for various loans in the sum of \$6000, upon which nothing has been paid in the way of principal or interest, and that said I. Yamamoto has no property of any

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description. The bill of complaint avers that the said G. Nakamura borrowed from said bank on his own unsecured note various sums aggregating \$16,328.85, upon which there is unpaid the sum of \$13,328.85. By various averments in the bill of complaint it is shown, that owing to his breach of duty and mismanagement the management of the partnership business was taken from G. Nakamura, and that the complainant M. Komeya, and other members of the partnership, have endeavored to conduct the business and in doing so have been compelled to borrow money on their own individual credit to the extent of \$19,000, and have been unable to make the business succeed, and that on the close of June 2, 1915, there was cash in hand in the sum of \$44.33, and that the liabilities of the bank, exclusive of capital account, amount to \$23,171.40, and the collectable assets amount to \$23,743.31.

While the bill of complaint, which prayed for dissolution of the partnership and a settlement of the partnership accounts and an adjudication of the liabilities of the partners among themselves, is inartistically drawn, yet the probative facts stated therein show that the partnership business had proven a failure and could not be conducted except at a loss; at least two of the partners, Nakamura and Yamamoto, have been guilty of a breach of duty as partners, in that they have withdrawn from the partnership business, without security, large sums of money aggregating more than \$20,000, nearly \$20,000 of which has not been repaid, is outstanding, and at least that portion of which was withdrawn by Yamamoto is uncollectable. The probative facts alleged in the bill of complaint also show a mismanagement by Nakamura, the only partner having experience and knowledge of the banking business and upon which the other partners relied, such mismanagement resulting in the apparent failure of the business. Under the facts alleged I am of the opinion that the bill presented a cause for a dissolution of the partnership, and a winding up of the partnership business. If that is true then there can be no doubt as to the juris-

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diction or power of the circuit judge to make an order appointing a receiver. Owing to the established principle of law that each partner is the agent of the others and of the copartnership, and in the absence of agreement on the part of all of the partners to the contrary, either partner may transact partnership business, reduce choses in action belonging to it and collect outstanding indebtedness, the protection of the interest of the creditors of the partnership, each of which has a lien through individual partners upon the partnership assets for his debt against the partnership, as well as the interest of the individual partners, required that the business under the conditions shown to exist in the bill of complaint should be placed in the hands of a receiver.

Discussing then the question of jurisdiction or power of the circuit judge to appoint a receiver in the equity suit, I think the correct rule is stated in 30 Cyc. 726, as follows: "In a suit for partnership dissolution and settlement, a court of equity has ample power to appoint a receiver, but the application of such appointment is addressed to the discretion of the court." In Pomeroy's Eq. Jur., Sec. 1333, it is said: "In suits for a dissolution or winding up of the partnership, and even in some very special cases without a dissolution, the court may appoint a receiver of the firm assets, when there is any misconduct on the part of the defendants, and even, perhaps, where the partners themselves are wholly unable to agree as to the management of the property and the settlement of the partnership affairs." The same learned author, in section 1330, in speaking of the appointment of receivers where two or more parties are equally entitled to possession of the property in litigation, says, "where two or more litigants are equally entitled, but it is not just and proper that either of them should retain it under his control,—as, for example, in some suits between partners." In *Ex parte Walker*, 25 Ala. 81, it is said: "The authorities affirm as a general rule, that when a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will

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be entitled to a decree for dissolution, a receiver will be appointed of course. The reason being that the same causes which would justify a decree for dissolution generally justify the appointment of a receiver.—Kerr on Receivers, 82 (note 1). The appointment of a receiver, in all cases, rests in the sound discretion of the court, and in determining its propriety, the facts of each particular case are to be considered." And to the same effect are the following authorities: *Anderson v. Powell*, 44 Iowa 20; *Law v. Ford*, 2 Paige 310; *Marten v. Van Schaick*, 4 Paige 479; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172, 177; *Birdsall v. Colie*, 10 N. J. Eq. 63; *Walker v. House*, 4 Md. Ch. 39. In *Speights v. Peters*, 9 Gill 472, the court at page 479 said: "But in respect of a fund which is claimed and is *prima facie* the proceeds of the partnership, it is but a provident exercise of equity power to place the property under the care of the court." In *Williamson v. Wilson*, 1 Bland Ch. (Md.) 418, 421, it is said: "When there has been a breach of duty by a partner, a receiver has been appointed and charged with the winding up of a commercial concern, *Peacock v. Peacock*, 16 Ves. 49; *Harding v. Glover*, 18 Ves. 281." In the case of *Whitman v. Robinson*, 21 Md. 30, it was held that the defendant, a partner, drew out and appropriated to his own use large sums of money when the partnership was embarrassed, and that such acts were misconduct justifying the appointment of a receiver. To my mind the case last cited is on all fours with the case at bar. In *Sieghortner v. Weissenborn*, supra, the New Jersey equity court at page 177 said: "Courts of equity will, for sufficient cause, dissolve a partnership before the expiration of the term for which it was entered into. And it is a sufficient cause for dissolution, that it clearly appears that the business for which the partnership was formed is impracticable, or cannot be carried on except at a loss. The object of all commercial partnerships is profit, and when that cannot be obtained, the object fails and the partnership should be terminated. *Baring v. Dix*, 1 Cox 213; *Jennings v. Baddeley*, 3 Kay & Johns.

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78; *Bailey v. Ford*, 13 Sim. 495. And this doctrine is adopted and approved by elementary writers of learning. Collyer on Part. §291; Story on Part. §290." In 30 Cyc. 655, it is said: "The absconding or other misconduct of a partner does not, *ipso facto*, dissolve the partnership, although it may be ground for a judicial dissolution." And the same authority on page 656 says: "As the object for which a partnership is formed is pecuniary gain, as soon as it becomes apparent that the business can no longer be carried on at a profit any member is entitled to have the firm dissolved."

Under the authorities and established rules of law I am of the opinion that the probative facts alleged in the bill of complaint for a dissolution of the partnership and a settlement of the partnership affairs set forth sufficient cause for a judicial dissolution and winding up of the partnership matters, and under the showing made in the bill and the established rules of equity the circuit judge had jurisdiction to appoint the receiver. The allegations of the bill for dissolution and settlement of the partnership alleged facts which, to say the least, made a *prima facie* case for dissolution and settlement of the partnership and for the appointment of a receiver, hence, to my mind, it cannot properly be held that the receiver was appointed without jurisdiction.

The petitioner relies upon general rules in cases other than partnership to establish that the appointment of the receiver by the respondent circuit judge was without jurisdiction. In 34 Cyc. 18, 19, the general rule is stated as follows: "A reference to the various decisions upon applications for the appointment of receivers will show that each case has been made to depend upon its own peculiar features in so far as particular facts are concerned and it is not often that one case will throw light upon another except so far as it may establish the general principles which should govern the exercise of the court's discretion upon such motions. These general principles are that plaintiff must show: (1) Either that he has a clear right to the property itself,

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that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and (2) that the possession of the property by defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from neglect, waste, misconduct, or insolvency, in which case a receiver will be appointed." The facts alleged in this case, to my mind, show mismanagement, waste, and probable waste, of the partnership assets, which, under the general rule just quoted, authorize the appointment of a receiver. The same general rule is laid down in 5 Pom. Eq. Jur. §64.

Petitioner relies upon other authorities to sustain his contention that the receiver was appointed without jurisdiction, or in excess of the jurisdiction, of the circuit judge, which, in my opinion, do not apply here. I will briefly review the authorities relied on by petitioner: In the case of the *International Trust Co. v. Decker*, 152 Fed. 78, an appeal from an order appointing a receiver for a corporation, the question was not one of power, but of propriety. In the case of *Warwick v. Stockton*, 55 N. J. Eq. 61, the court declined to appoint a receiver on the ground that the facts alleged did not show a partnership but did show that the plaintiff and the defendant had entered into a joint adventure. No question of jurisdiction, or excess of jurisdiction, is discussed in that case, which was an original application for appointment of a receiver in the chancery court and there denied. In the case of *Smith v. Lowe*, 1 Edw. Ch. 33, which was a suit by one partner to wind up the partnership, an original application in the court of chancery for the appointment of a receiver was denied on the ground that the plaintiff was in possession of all the partnership property and in position to protect himself, to which the defendant did not object. In *Aldrich v. Bag Co.*, 87 Atl. (N. J.) 65, there was an application for the appointment of a receiver for a corporation under a statutory provision, and the facts alleged did not make out a case by showing insolvency on the part of the corporation as

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required by the statute. In the case of *Gray v. Newark*, 79 Atl. (Del.) 739, an application was made for the appointment of a receiver for a corporation, which was denied, but the defendant corporation was required to give an indemnifying bond in the sum of \$20,000 to secure the preservation of the plaintiff's rights. In the case of *Buchanan v. Comstock*, 57 Barb. 568, plaintiff filed his bill to dissolve a partnership between himself and the defendant and asked for the appointment of a receiver. His application was denied on the ground that the defendant came in and offered to divide all of the partnership property equally with the plaintiff and to give an indemnifying bond to secure the plaintiff in any other rights that might be adjudicated to him in the case. In the case of *Cronan v. Dist. Court*, 15 Idaho 184, the district court had appointed a receiver to conduct the business of a corporation and was carrying on through its receiver a lumber business for the corporation; the supreme court of Idaho granted a perpetual writ of prohibition against the further conduct of the business of the defendant by the district court through its receiver. In that case it appeared that the corporation was not insolvent, nor was it in "imminent danger of insolvency" within the meaning of the statute of Idaho providing for the appointment of receivers for corporations when the corporation is insolvent or in imminent danger of insolvency. It was made to appear in that case that the corporation there involved was possessed of unincumbered assets to the value of \$1,000,000. over and above its liabilities.

To my mind the cases relied on by petitioner are not applicable to the case at bar. The rules relating to the appointment of receivers for corporations and for individuals other than partnerships are entirely different from those relating to the appointment of receivers for a partnership when the partnership business has proven a failure, cannot be conducted except at a loss, or there has been mismanagement or breach of duty on the part of one or more of the partners. Another case relied on by the petitioner is that of *Cal. Feed Co. v. Club Stables*, 10 Haw.

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209, 214. In that case a creditor, who was also a stockholder (but the fact that he was a stockholder was not alleged in his bill of complaint), commenced his suit in equity and obtained a receiver for the corporation. From the decree appointing the receiver an appeal was brought to this court. There were three opinions in the case, but each one holding that if the complainant should amend his bill of complaint and allege the fact, which appeared in evidence, that he was a stockholder of the corporation and therefore interested in the property, the decree appointing the receiver would be affirmed, otherwise it would be reversed. I fail to see any application of the rule enunciated in that case to the case at bar. There is no question but that the complainants in the equity suit for dissolution and winding up of the partnership business are interested in the partnership property. They are also interested in a correct application of all of the partnership assets to the partnership debts. They are interested in having all outstanding debts due the partnership collected and applied solely, in the first instance, to the payment of the debts owing by the partnership. And under the authorities the circuit court through its receiver was charged with the duty of taking charge of the partnership assets and winding it up and settling the partnership liabilities and accounts of the partners as among themselves. Many authorities, English and American, not referred to, can be cited showing that it was the duty of the circuit judge to appoint a receiver, and all of the authorities agree that it is largely a matter within the discretion of the circuit judge. While prohibition will lie to suspend or restrain the execution of a judgment, order or decree made by a circuit judge without jurisdiction, it will not lie in a case where the circuit judge had jurisdiction and the matter was discretionary.

In my opinion the alternative writ heretofore issued should be quashed and the peremptory writ of prohibition denied.

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MRS. INOAOLE AHULII v. YIP LAN.

MOTION TO DISMISS WRIT OF ERROR.

ARGUED JULY 13, 1915.

DECIDED AUGUST 4, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*motion to dismiss writ—evidence.*

On motion to dismiss a writ of error on the ground that a writ of possession issued and was fully satisfied before the writ of error issued, the writ of possession and return thereon, and an affidavit *altunde* showing that defendant had paid the costs, will not be stricken from the record on motion, the same being competent evidence for the purpose of the motion; but an affidavit of the officer executing the writ of possession, showing what he did, will be stricken from the record on motion, as the execution of the writ must be shown by the officer's return, which, if defective, may be cured by amendment in the court below, but not otherwise.

SAME—*same—validity of writ of possession.*

Where the defendant in error moves to dismiss the writ of error on the ground that a writ of possession issued on the judgment was fully satisfied before the writ of error issued, he must show that the writ of possession issued by authority of law; a writ which issued during the pendency of an appeal from the judgment, without notice to the judgment defendant and without opportunity to give a stay bond, was without authority of law, and will not support the motion to dismiss the writ of error, it appearing that the appeal was discontinued after the satisfaction of the writ of possession and prior to the issuance of the writ of error.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff in error (defendant in an action for summary possession in the district court of Makawao) has sued out a writ of error from this court. The judgment below was in favor of the plaintiff. The docket of the district magistrate shows that the judgment was rendered on the 26th of February, 1915; that a certificate of appeal from said judgment to the circuit court was filed on the same date; that on March 5, 1915, the defendant (plaintiff in error here) perfected his appeal by filing a

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bond and paying costs. The transcript of the district magistrate's docket shows also that on the 6th day of March, 1915, the day after the appeal was perfected, a writ of possession was issued by him, which writ of possession was returned into his court on the 26th day of March, 1915, as having been satisfied by putting the plaintiff into possession on the 18th of March, 1915. The plaintiff below (defendant in error here) has moved to dismiss the writ of error upon the ground that the said judgment has been satisfied, basing his motion upon the records and proceedings on file in this court, and on the affidavits of David Morton, deputy sheriff of the district of Makawao, and of Edmund H. Hart, clerk of the circuit court of the second circuit. The affidavit of David Morton shows that he executed the said writ of possession by placing the plaintiff in the action (defendant in error here) in possession of the identical land named in the complaint in the action. The affidavit of Edmund H. Hart shows that he is clerk of the circuit court of the second circuit of the Territory of Hawaii; that said action for summary possession was appealed from the district court of Makawao to the circuit court of the second circuit; that on the 20th of March, 1915, D. H. Case, Esq., and Enos Vincent, Esq., claiming to be the attorneys of the defendant named in the action, discontinued said appeal and paid to deponent, as clerk of the above entitled court, all of the costs which at the time were accrued and due. The plaintiff in error has moved to strike from the files the affidavits of the said David Morton and the said Edmund H. Hart on the ground that said affidavits are not proper parts of the record in this court. The plaintiff in error has also moved to strike from the files herein the writ of possession, and the return of the deputy sheriff thereon on the ground that it "is not based upon, nor does it conform to, the judgment rendered by the district court of Makawao in the above entitled cause," and that "the certified copy of the record of the district court of Makawao filed herein of all proceedings had prior to the issuance of the writ from the above entitled court, does not

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show that any writ of possession was issued from said district court in said case." The motion, in so far as it seeks to strike the return of the deputy sheriff and said writ of possession, is upon the ground that it was not actually filed in the district court of Makawao until after the issuance of the writ of error out of the above entitled court in this case.

We will first dispose of the motions to strike. The motion to strike the affidavit of David Morton, deputy shèriff, explanatory of his return, is sustained. The return of the officer should show the manner, time, place and circumstances under which the writ was executed by him. If any error is made in the return by way of omission or otherwise, such error should be corrected by amendment in the district court.

The motion to strike the affidavit of Edmund H. Hart, clerk of the circuit court of the second circuit, showing payment of costs and discontinuance of the appeal, is overruled. For the purpose of the motion to dismiss the writ of error, the payment of costs by the defendant in the judgment and writ of possession is material, and where that fact has not been shown in the record it is proper for the defendant in error, in support of his motion, to show it by affidavit.

The motion to strike from the record the writ of possession, and the return of the officer thereon, is denied. Whether the said writ of possession and return thereon is properly a part of the record of the district court in this action is not material. The said writ of possession and return thereon is proper evidence in support of the motion of defendant in error to dismiss the writ of error, and it is immaterial as to how the writ of possession and return thereon comes into this court; whether it is filed by the district magistrate as a part of his record in the case, or is filed by the defendant in error in support of his motion.

The defendant in error, in support of his motion to dismiss the writ of error, relies upon the fact that the judgment has been fully satisfied. The transcript of the district magistrate

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shows that on the day the judgment was rendered the defendant filed his notice of appeal and within ten days perfected same by paying costs and depositing bond (as required by section 2766 R. L.), which he did on March 5; that on the following day, after the appeal was perfected, the writ of possession issued. There is no showing in the record whatever that the writ of possession issued upon notice to the defendant, or that any showing was made to the district court as to the necessity of issuing the writ. It is apparent from the record that the writ of possession issued during the pendency of the appeal and after the bond perfecting the appeal had been given. While upon a writ of error to review a judgment, ministerial acts subsequent to the judgment, such as the issuing of writs of execution and of *renditioni exponas*, will not be reviewed; yet upon a motion of this kind by the defendant in error to dismiss the writ of error upon the ground that the judgment has been satisfied, the burden of showing the satisfaction of the judgment is upon the movant. *In re Hutchins*, 15 Haw. 624, it was held on certiorari that in summary possession, after an appeal had been taken and perfected, the district magistrate had no jurisdiction to issue a writ of possession without notice to the defendant; that such appeal operates as a stay of execution, unless the magistrate, upon good cause shown, allow execution to issue pending the appeal, unless a bond should be filed conditioned for the prosecution of the appeal and the performance of the judgment. In a case of this kind, where the defendant in error moves to dismiss the writ of error on the ground that execution has been fully satisfied, he must show that a valid execution issued and that such execution has been fully satisfied. Under the decision *In re Hutchins*, supra, we hold that the appeal to the second circuit court removed the cause, during the pendency of that appeal, out of the jurisdiction of the district magistrate, and that the writ of possession issued without authority of law, and writ of error lies to review the judgment of the district magistrate. But for the affidavit of Edmund H. Hart, clerk of the

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circuit court of the second circuit, it would appear from the record in this case that the case was pending on appeal to the circuit court, but that affidavit, filed by the defendant in error, shows that the appeal to the circuit court was dismissed before the writ of error was sued out in this court, hence no question of conflict of jurisdiction arises in this case between this court and the circuit court of the second judicial circuit.

The motion to dismiss the writ of error is denied.

E. Murphy and *E. C. Peters* for the motion.

D. H. Case and *E. Vincent* contra.

IN THE MATTER OF THE ESTATE OF JAMES
OSWALD LUTTED, DECEASED.

MOTION TO DISMISS APPEAL.

ARGUED AUGUST 2, 1915.

DECIDED AUGUST 4, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*order appointing special administrator.*

An order made by a circuit judge appointing a special administrator is interlocutory and not appealable.

OPINION OF THE COURT BY ROBERTSON, C.J.

On July 13, 1915, by an order made by the circuit judge sitting in probate, the will of one James Oswald Luttet, deceased, was admitted to probate and Elia A. C. Long was appointed administrator-with-the-will-annexed of the estate. From that order Mrs. Sledge, the daughter of the decedent, and a beneficiary under the will, appealed to this court, the appeal being now pending. On July 20, 1915, the circuit judge, upon the petition of a Mrs. Brown, a devisee named in the will, made an order appointing the said Long as a special administrator of

the estate. Mrs. Sledge at once appealed from that order. For present purposes it is assumed that a proper and sufficient showing for the appointment of a special administrator *pendente lite* was made. This is a motion filed in this court by Mrs. Brown that the appeal from the order of July 20 be placed upon the calendar and dismissed upon the ground that an order appointing a special administrator is not one from which an appeal will lie to this court.

In this Territory there is no statute dealing with the appointment of special administrators, hence, the right to appoint such, and their status after appointment, rest upon the common law. We have no doubt but that the circuit judges in this Territory, in exercise of the jurisdiction in probate conferred upon them by law, have authority, in proper cases, to appoint special administrators whose duty it would be to collect and conserve the property of the estate for the time being and until the appointment of a permanent executor or administrator. The duties of a special administrator are similar to those of a receiver in chancery. See 1 Woerner's Am. Law of Adm. Sec. 181. "An administrator *pendente lite* has been said to be not properly the representative of the deceased, but rather an appointee or officer of the court, his office closely resembling that of a receiver in chancery." 18 Cyc. 1326.

Whether or not an appeal will lie from an order appointing a special administrator depends upon statute. Counsel for the movant cites *Pratt v. Kitterell*, 15 N. C. 144; *McClanahan v. McClanahan*, 59 Tenn. 379, and *In re Est. Carpenter*, 73 Cal. 202, holding that under the statutes of their respective jurisdictions such an order is not an appealable one. In the case of *Estes v. Probate Court*, 88 Atl. 977, the supreme court of Rhode Island regarded an order appointing a temporary guardian for an incompetent as interlocutory and not appealable. Opposite counsel cites *Long v. Richardson*, 62 S. W. (Tex.) 964, wherein it was held that under the statutes of Texas an order refusing to appoint a temporary administrator is an appealable one. In

Estate of Luttet, 22 Haw. 712.

In re Est. of Pope, 75 Neb. 550, an order removing a special administratrix was held to be a final and appealable order. Under our statutes the appealability of such an order depends upon whether or not it is to be regarded as a final order. If it is a merely interlocutory order no appeal lies unless it has been expressly allowed by the circuit judge. The appeal in this case was not so allowed.

We think the purpose for which a special administrator is appointed shows that such an appointment is in its nature interlocutory. The order of appointment adjudicates no property rights; it determines nothing except that property should be conserved and protected from loss or injury until some one shall be appointed and authorized to take possession of the estate for the purpose of administering it. If such an order were appealable it would tend to defeat the very object for which temporary administrators are recognized by the law. Following the analogy of the appointment of a receiver, an order appointing a temporary administrator is to be regarded as interlocutory and not appealable. "Orders appointing, removing, refusing to appoint, or refusing to remove receivers are generally deemed to be interlocutory and hence not appealable unless the statute authorizes an appeal." 2 Cyc. 611. See also, 2 Enc. Pl. & Pr. 121; *Amer. Const. Co. v. Jacksonville &c. R. Co.*, 148 U. S. 372, 378; *Milwaukee &c. R. Co. v. Soutter*, 154 U. S. 540. In the absence of any contention to the contrary this was assumed to be the rule in the case of *Oyama v. Stuart*, ante p. 693.

We hold that the order appointing the special administrator in this case was not a final and appealable order. The motion is, therefore, granted, and the appeal is dismissed.

W. T. Carden for the motion.

E. C. Peters contra.

Brown v. Brown, 22 Haw. 715.

JACOB F. BROWN AND SARAH E. BROWN, HIS WIFE,
IN HER OWN RIGHT, *v.* ARTHUR M. BROWN,
TRUSTEE UNDER THE WILL OF MARIA KING;
KENNETH F. BROWN, ALICE BROWN, GER-
TRUDE BROWN HUMPHRIES, AND W. R. HUM-
PHRIES, HER HUSBAND.

SUBMISSION WITHOUT ACTION.

SUBMITTED AUGUST 7, 1915.

DECIDED AUGUST 14, 1915.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF WATSON, J., ABSENT.

TRUSTS—investment of trust funds.

In this jurisdiction the rule as to the investment of trust funds is that the trustee must act with honesty, prudence and faithfulness, and exercise such sound discretion as prudent business men exercise in the investment of their own moneys, having regard not only to the income, but to the security of the principal, and to the permanency of the investment.

SAME—investment in second mortgage.

The application of the rule to an investment of trust funds in a second mortgage upon real estate, assuming the existence of the requisite honesty and good faith, would involve the question whether, under all the circumstances, it could be regarded as a sound and prudent business transaction. The two principal matters to be considered are, (1) the value of the security, and (2) the ability of the trustee to protect the investment in the event of the foreclosure of the senior mortgage.

SAME—same.

Under the special facts of this case the taking of a second mortgage for the purchase price upon the sale of incumbered property held proper.

OPINION OF THE JUSTICES BY ROBERTSON, C.J.

Under the will of Maria King, late of Honolulu, deceased, the defendant, A. M. Brown, holds as trustee, certain parcels of land situate on the Island of Molokai, upon which are running one hundred head of cattle, in trust, with power to sell and

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to reinvest the proceeds, to pay the net rents, income and profits to the testatrix' daughter, Sarah E. Brown, during her natural life, and upon her death to convey the property, discharged of the trust, to the lawful issue of her body living at her decease, children of any deceased child to take their parent's share. The defendants Kenneth and Alice Brown, and Gertrude Brown Humphries are children of the said Sarah E. Brown. The lands are valuable only for grazing purposes, and in connection with adjoining and nearby lands, their fair and reasonable value being \$20,000. The property is subject to mortgage indebtedness in the principal sum of \$6,333, and, with interest calculated to July 31, 1915, amounts to \$6,589.

As is frequently the case in submissions upon agreed statements, the facts are not stated as fully and satisfactorily as they might have been, but we are justified in inferring from what is stated that though that indebtedness is not now due and payable, or, if due, that there is no threat of foreclosure, yet the trustee has no funds or other property with which to pay the indebtedness when it does mature, and that the indebtedness could not be paid off during the continuance of the trust except through a sale of a portion of the lands.

It also appears that Sarah E. Brown owns several pieces of land in the same vicinity in her own right, upon which she runs cattle, and intends to purchase, for \$5000, the ahupuaa of Onoulimaloo, containing 753 acres, which, it is stated, "cuts through the entire center of said lands for a long distance," and she desires to buy from the trustee the lands of the King estate, with the purpose of combining the whole into a cattle ranch, which with proper development would have a promising future. An offer was made to the trustee by Sarah E. Brown by letter dated July 22, 1915, to purchase the lands of the estate for \$20,000, upon the following plan for financing the proposed undertaking: To borrow, upon a first mortgage, the sum of \$30,000 (payable in five years), and to give the trustee a second mortgage for \$20,000, the amount of the proposed purchase

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price of the estate lands; the security for these mortgages to be all the ranch property and certain improved land situate at Waikiki, Honolulu, belonging to Mrs. Brown, of an aggregate present value of \$65,000. The trustee, in writing, accepted the offer upon the understanding that his mortgage would be for the sum of \$13,300, bearing interest at the rate of six per cent. per annum, and payable in five years, the remaining difference between the sum of \$20,000 and the amount of the existing mortgage indebtedness of the trust to be paid off in cash. All existing mortgages to be paid off. All the parties in interest in the trust, now living, believe that the proposed transaction would be for the best interest of the estate, and have urged the trustee to carry out the agreement. The trustee, being advised by counsel that there is some doubt about his power to take such second mortgage in payment for the purchase price of the lands, has declined to carry out his said agreement.

The general question presented for consideration is as to when, if at all, may a trustee invest trust funds upon a second mortgage upon real estate. In this jurisdiction the rule as to the investment of trust funds is that the trustee must act with honesty, prudence and faithfulness, and exercise such sound discretion as prudent business men exercise in the investment of their own moneys, having regard not only to the income, but to the security of the principal and to the permanency of the investment. *In re Estate of Banning*, 9 Haw. 453; *In re Guardianship of Parker*, 14 Haw. 347; *Estate of Cummins*, 16 Haw. 185. The application of this rule to an investment of trust funds in a second mortgage upon real estate, assuming the existence of the requisite honesty and good faith, would involve the question whether, under all the circumstances, it could be regarded as a sound and prudent business transaction. This, in the absence of statute or special direction, is the ultimate test as to the making of any investment by a trustee, and it is obvious that under some circumstances a second mortgage might offer a safer and better investment than, under other circumstances,

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a first mortgage would provide. In 39 Cyc. 399, it is said, "Generally speaking, a mortgage on real estate encumbered by prior liens is not such an investment as a trustee is authorized to make, even where he is clothed with large discretionary powers. But it cannot be said that under every circumstance such an investment is inconsistent with sound discretion. The question is always one of proper care and prudence." In 1 Perry on Trusts, Sec. 452, it is said, "A trustee ought not as a rule to invest in second mortgages. * * * The rule is not inflexible, but subject to the higher rule that the trustees are always to employ such care and diligence in the trust business as careful men of discretion and intelligence employ in their own affairs." Cases might be reviewed in which trustees have been held liable for losses occurring through imprudent investments in second mortgages but it would add nothing of value to the discussion. In the case of *Estate of Bartol*, 182 Pa. St. 407, 417, the court said, "The will did not restrict the trustees to first mortgage bonds, and it does not at all follow that a second mortgage bond may not be a first class security." In *Monroe v. Osborne*, 43 N. J. E. 248, 253, the court said, "Second mortgages on lands as securities for trust funds have been regarded as improper and questionable investments, not necessarily wrong and conclusive on a charge of breach of trust, but sufficient to cast on the trustee the burden of satisfactorily showing that his act was prudent or unavoidable under the circumstances. Each case must, however, stand on its own circumstances, and a general rule, applicable to all cases, is that a trustee must use the same care, skill, diligence and prudence in the management of the trust and his dealings with the trust property which a man of ordinary care, skill and prudence would use in his own transactions and with his own property under like circumstances." In *Taft v. Smith*, 186 Mass. 31, 33, the court said, "We are aware that in several cases in other States it has been stated that a trustee should not invest in second mortgages. While we accept that as a principle generally to be applied, we cannot

accept it as an absolute, ironclad rule. After all, the true rule is whether under the circumstances sound discretion was exercised, and it cannot be said that under every conceivable practical set of circumstances an investment in a second mortgage is inconsistent with sound discretion."

The two principal matters ordinarily to be considered with reference to the safety and soundness of an investment of this kind are, (1) the value of the security, and (2) the ability of the trustee to protect the investment in the event of the foreclosure of the senior mortgage. In regard to the value of the proposed security, \$35,000 over and above the amount of the first mortgage, we deem it sufficient, though not more than sufficient. The amount of the two mortgages, \$43,300, would be about two-thirds of the present value of the property to be covered by the mortgages. As to the second point referred to, it is manifest that, as all the property of the estate is proposed to be put into the second mortgage, the trustee would be unable to protect the investment, in case the mortgagor should fail to meet the conditions of the first mortgage, by taking over the senior security. Were it not for the fact about to be adverted to again we should not hesitate to hold that the proposed transaction is not a safe and prudent one for the trustee to consummate. In *Whitney v. Martine*, 88 N. Y. 535, 539, a case of an investment upon second mortgage by an agent of funds of his principal, the court said, "Perhaps it might not be sufficient to charge the defendant for neglect of duty on the last evidence referred to, and there would be ground for hesitation, independent of the fact that the mortgages of the plaintiff were second mortgages, taken after others of a large amount had been given, and thus would render it necessary for the plaintiff, on an emergency, to raise a large amount to protect a comparatively small sum loaned by her upon the property. Loans under such circumstances are always hazardous and doubtful, * * * And, as a general rule, it may properly be laid down that it is not prudent or safe to advance moneys on second mortgages when

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there are large prior incumbrances, and especially where the personal security of the mortgagor is in any way precarious. Such an investment is not a first-class one." But in the case at bar the whole, or practically all, of the estate in the hands of the trustee is now subject to incumbrances which the trustee has no funds to pay off. It would seem, therefore, that the estate would be in no worse condition than it is at present were the proposed transaction to be carried out, and if, as the agreed statement of facts shows, the value of the Molokai property would be enhanced by its combination under one ownership, the estate may be placed in a better position than it now is. We may say also that the fact that all the beneficiaries under the trust now living are in favor of having the proposed arrangement consummated is of some weight in deciding the matter.

After careful consideration, though with some hesitation, we have reached the conclusion that the proposed transaction is a prudent one for the trustee to effect under the circumstances stated, and that there is no lack of power on his part to make the investment in question. And as the supposed want of power is the only ground upon which the trustee has based his refusal to perform his agreement, a decree requiring him to perform it may be entered.

Castle & Withington for plaintiffs.

J. W. Cathcart for defendants.

Borba v. Kaina, 22 Haw. 721.

A. BORBA, TRADING AS THE CENTRAL STORE, v.
DAVID KAINA, DEFENDANT, CHARLES WIL-
COX, AUDITOR OF THE COUNTY OF MAUI, TER-
RITORY OF HAWAII, GARNISHEE.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

SUBMITTED AUGUST 31, 1915.

DECIDED SEPTEMBER 1, 1915.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD
IN PLACE OF WATSON, J., ABSENT.

LIMITATION OF ACTIONS—*personal privilege—waiver.*

The defense of the statute of limitations is a personal privilege which a party may exercise, or waive, but on his default the court cannot exercise the privilege for him.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced an action in the district court of Wailuku against the defendant to recover an alleged indebtedness upon account for goods, wares and merchandise sold, the complaint containing two counts, the second one being for the same indebtedness upon an account stated. The plaintiff alleged in the complaint that defendant was a laborer in the employ of the County of Maui and entitled to receive his salary from Charles Wilcox, auditor of the County of Maui, and requested that the summons contain a direction to the officer serving the same to leave a true and attested copy thereof with the said Charles Wilcox, auditor of the County of Maui. The defendant being regularly summoned, failed to appear at the time fixed for hearing in the complaint, whereupon the district magistrate entered default against him. Plaintiff introduced a witness and by him proved the sale and delivery of the goods, the value of which was sought to be recovered, and that the value of same had not been paid. The witness testified that he had rendered a bill to the defendant and that there was no dispute as to the amount of the bill. The district magistrate rendered judgment of nonsuit in favor of the defendant, holding that it was

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necessary for the plaintiff to prove that the debt was incurred within the statutory period of limitation. From that judgment the plaintiff has appealed to this court upon points of law stated in the notice and certificate of appeal as follows: "1. That the court erred in rendering judgment for the defendant. 2. That the court erred in holding that it was necessary for the plaintiff to prove the goods sold and delivered were sold and delivered in less than six years before suit was instituted."

The district magistrate was clearly in error in rendering judgment for the defendant. "The defense of the statute of limitations is a personal privilege of which the party in whose favor it operates may take advantage or not as he desires" (*Dillingham v. Scott*, 20 Haw. 4, 6). If it be a fact that the said goods were sold more than six years prior to the institution of the action the defendant should have appeared and availed himself of the statute by asserting a defense thereunder. Failing to do this, the court should not have made the defense for him.

This court reluctantly feels under the necessity of referring to certain charges made in the brief of appellant against the integrity of the magistrate. Examination of the record does not show culpable conduct on the part of the district magistrate but does show an erroneous ruling by him. Personalities,—charges which impugn the integrity of a judge trying a case, couched in language tantamount to a charge of corruption on the part of the judge, cannot be tolerated in briefs filed by counsel. We feel compelled to condemn such practice and trust that we will not have occasion again to refer to a matter of this kind.

The judgment is reversed with cost of appeal to appellant and the cause is remanded to the district court with directions to enter a judgment in favor of the plaintiff for the sum of \$13 with attorney's commissions and cost of the action incurred in the district court.

E. Murphy for plaintiff.

No appearance for defendant.

Payne v. Furtado, 22 Haw. 723.

JOHN PAYNE v. M. T. FURTADO, DEFENDANT, T.
MIYASAKI, GARNISHEE.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.
HON. C. F. PARSONS, JUDGE.

SUBMITTED AUGUST 21, 1915.

DECIDED SEPTEMBER 3, 1915.

ROBERTSON, C.J., QUARLES, J., AND CIRCUIT JUDGE ASHFORD
IN PLACE OF WATSON, J., ABSENT.

GARNISHMENT—request for process—summons.

A prayer contained in plaintiff's complaint in an action in a circuit court that the garnishee "be summoned to appear and answer this demand as is by law provided," is a sufficient request for the issuance of a summons to the garnishee in a form appropriate to the requirements of R. L. 1915, Sec. 2801.

SAME—garnishee summons—copy—certification.

A copy of the original summons served upon a garnishee as required by law, which is certified by a deputy sheriff to be a true copy, need not bear the original signature of the clerk nor the impress of the seal of the court out of which it issued, if it shows upon its face that the original was signed by the clerk and bore the seal of the court.

SAME—time for appearance of garnishee—waiver of irregularity.

The time specified in the summons for the appearance of the garnishee should be the same as that of the defendant. An irregularity in the designation of the time for appearance will be waived by making a general appearance in the cause.

SAME—travelling fees and expenses of garnishee.

The status of an order for execution entered against a garnishee who has not appeared is not affected by the failure to tender him the amount of his fees and expenses.

SAME—non-appearance of garnishee—notice of hearing—judgment.

Where no action is had or order made in court on the return day, the defendant having previously confessed judgment, the garnishee is entitled to notice of any proceeding subsequently to be had affecting his rights. Before a valid judgment can be entered against a garnishee who has not appeared the plaintiff must show by evidence the value of the property in the garnishee's hands belonging to the defendant, or the amount of the debt due to the defendant. Where judgment has been obtained against the defendant upon his default or confession, the garnishee may appear

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and make his disclosure at any time before judgment has been entered against him.

OPINION OF THE COURT BY ROBERTSON, C.J.

This case has come to this court upon the exception of the garnishee to the denial by the circuit court of his motion to vacate an order for execution theretofore made against him in the cause. It appears by the record that judgment for the amount claimed by the plaintiff was entered against the defendant upon his confession, and that thereupon, the garnishee having made no appearance, an order was entered that execution for the amount of the judgment issue against the estate of the garnishee "as his own proper debt." That order the garnishee moved to vacate. The circumstances in detail will be stated in connection with the rulings to be made on the several grounds set forth in the motion.

1. It is contended that the circuit court was without jurisdiction to issue the summons against the garnishee for the reason that the petition contained no proper request for the issuance of summons as provided by the statute. So much of the section of the statute (R. L. 1915, Sec. 2801) as is pertinent to this point provides that a creditor who brings action against his debtor "in his petition for process may request the court to insert therein a direction to the officer serving the same to leave a true and attested copy thereof" with the garnishee or at his usual place of abode. The plaintiff, in his complaint, alleged that "T. Miyasaki, of Honokaa, Hawaii, is the attorney, agent, factor, trustee or debtor of the defendant, M. T. Furtado, and, as such, has goods, effects or money in his hands belonging to the said defendant." In the prayer the plaintiff asked "that the said T. Miyasaki, garnishee hereinbefore mentioned, be summoned to appear and answer this demand as is by law provided." The summons was on the usual printed form in use by the circuit courts.

The cases of *Frag v. Adams*, 5 Haw. 664, and *Young Hin v.*

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Hackfeld, 16 Haw. 427, were cited. In the former case the printed forms in use at the time contained no request for process against the garnishee, and as there was no such request in the complaint itself there was no basis for the summons issued against the garnishee. In the latter case, which also was a district court case, the printed form of summons did contain a request that the court insert a direction that an attested copy of the summons be served upon the garnishee. As to this the court said, "We consider the form used as sufficiently conforming to the statute." 16 Haw. 430. The form of "garnishee summons" used in the circuit courts does not contain a request that the garnishee be served such as that contained in the district court forms. Proper practice in the circuit courts requires that the plaintiff's complaint allege that the necessary relation exists between the defendant and the person named as garnishee, and contain a request or prayer that such person be served with process as required by the statute. This was done in the case at bar with enough particularity and strictness. The garnishee could be summoned only in the manner required by the statute and the prayer that he be "summoned to appear and answer this demand as is by law provided" required the issuance of a summons in a form appropriate to the requirements of the statute. That was done.

2. It is contended that no legal service of process was made on the garnishee for the reason that the copy of the summons served upon him did not bear the impress of the seal of the court or the signature of the clerk. Section 2801 provides that the plaintiff may request the court to direct the officer serving the process to leave "a true and attested" copy with the garnishee, also that the summons and direction "shall be signed and issued in the same manner as summonses are usually issued in civil actions." Section 2354 (R. L. 1915) provides that "Every summons issued under the seal of a court of record, shall be served * * * upon the defendant, by the delivery to him of a certified copy thereof," etc. These provisions amount to just

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this: upon the plaintiff's request that the officer be directed to leave "a true and attested" copy of the summons with the garnishee the officer shall serve him with a "certified" copy thereof. It is manifest that by the words "true and attested" and "certified" is meant the same thing. The case of *Hayashi v. Iwata*, 14 Haw. 627, is not in point because there the copy served on the garnishee did not show that the original summons had been signed by the clerk and sealed with the seal of the court. In other words, if the copy served on the garnishee was what it purported to be, namely, a true copy of the original, then the original had not been signed or sealed, and hence never legally issued. In the case at bar the original summons was signed by the clerk of the court and it bore the seal of the court. The copy served on the garnishee showed that. It was a correct copy of the original, and, upon its face, was certified to be a true copy by the deputy sheriff. This was proper under the ruling made in *Pasquoin v. Sanders*, 20 Haw. 352, and *Territory v. Kapiolani Estate*, id. 548, to the effect that the certification may be made by any officer (including a deputy sheriff) authorized by statute to serve process.

3. It is contended that the circuit court "was without jurisdiction to summon the said garnishee to appear in this (circuit) court and cause on the 7th day of July, 1914, as set forth in said garnishee summons." The summons was issued on June 12, 1914, and was served, on the following day, upon the defendant and the garnishee. It directed the defendant (in the usual form conforming to R. L. Sec. 2353) "in case he shall file written answer within twenty days after service hereof, to be and appear before the said circuit court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said circuit court at the next succeeding term thereof, to-wit, the January 1915 term thereof, to be holden at Hilo, County of Hawaii, on Wednesday the 13th. day of January next, at ten o'clock, A. M."

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etc. And it summoned the garnishee to "appear personally in said court on Tuesday the 7th day of July next at ten o'clock A. M. then and there on oath to disclose" etc. The statute provides that the garnishee shall be summoned to appear "upon the day or term" appointed in the process. The statute contemplates that the garnishee shall be notified to appear at the same time as the defendant. In a case commenced in a district court both parties would be directed to appear at the same day and hour. In the case at bar the time for the appearance of the garnishee should have been designated in the same language as that used with reference to the defendant. The irregularity, however, was one to be taken advantage of, if at all, by motion upon a special appearance for the purpose. Here, the appearance, though purporting to be special, was not for the purpose of quashing the summons, but for the purpose of having vacated the order for execution to the end, apparently, that the garnishee may have an opportunity to make his disclosure. In his affidavit attached to the motion the garnishee stated that he "at all times intended to appear and make his disclosure as required by law when notified to do so." The motion in question, like a motion to open a default and for permission to answer, constituted a general appearance (*Zeave v. Zeave*, 17 Haw. 463), and a waiver of the defect in the summons. *Ferreira v. Kamo*, 18 Haw. 593.

4. Another ground for the motion was stated to be "That the said garnishee was not paid for travelling fees and expenses for his attendance" as required by the statute. Section 2816 of the Revised Laws provides that every garnishee "shall be paid his travelling fees and expenses for his attendance before any court under the provisions of this chapter on the same scale and at the same rate as witnesses required by subpoena to attend on the trial of any civil suit in said courts." The court below was right in ruling against this point. The payment or tender of an amount to cover the fees and expenses of the garnishee is not a necessary prerequisite to the entry of judgment against the garnishee in a proper case. The liability of the garnishee in

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case he appears and discloses as well as when he does not do so is defined in another section of the law. The status of the order in question was in no way affected by the failure to make a tender to the garnishee, and it will not be necessary to consider whether such tender was waived by reason of the failure of the garnishee to demand payment of his fees and expenses when he was served with process.

5. The remaining two points raised by the garnishee were well taken, and they may be considered together. They are that the order for execution ought not to be allowed to stand because the garnishee was not notified of the time set for the hearing of the cause, and that, in fact, no hearing was ever had as to his liability in the premises. The action was in assumpsit for money had and received. On July 6, 1914, the defendant filed an answer in which he admitted all the allegations contained in the plaintiff's complaint and consented that judgment be entered against him. On July 7, the day the garnishee had been notified to appear and disclose, nothing appears to have been done in the cause though a term of court was then pending. On September 9, the plaintiff appeared in court and asked for judgment "upon the pleadings," and the court ordered judgment to be entered against the defendant. The case as to the garnishee was continued until September 14, at 10 A. M. On the last mentioned date counsel for the plaintiff appeared and contended that an "order should be made against the garnishee," and judgment was thereupon authorized "against the garnishee in the amount prayed." On the same day a judgment was duly entered against the defendant for the sum of \$419.20, and costs taxed at \$48.70. No judgment was entered against the garnishee but the order in question was made "that execution issue against the estate of T. Miyasaki for the sum of \$467.90, as his own proper debt, and the lawful costs." The order purports to have been made upon the motion of the plaintiff. This is understood to have had reference to the contention of counsel orally advanced in court as above mentioned. The garnishee was given no notice that any

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proceedings were to be had on the 9th or 14th of September. Assuming that in the absence of any objection on the part of the garnishee to the irregularity in the summons as to the time named for his appearance in court he would have been bound by any proceedings had or action taken on that day, had any such been had or taken, the fact that no order was then made continuing the case to a day certain entitled the garnishee to notice of any subsequent proceeding that was to be had affecting his rights in the matter. Common justice would so dictate. See *Vivas v. Akoni*, 14 Haw. 115. The statute does not require a garnishee to file a written answer or disclosure. He may appear and make his disclosure orally under oath at the trial or at any time before the trial, and an order of default made against him before trial would, on his application, be set aside. *Bank of Hawaii v. Parke*, 15 Haw. 645. Section 2806 of the Revised Laws provides that "If the said attorney, agent, factor or trustee or debtor fails to appear upon the day and hour of hearing named in the summons or writ above mentioned, or if, having appeared, he refuses to disclose * * * the case shall proceed to trial, and if the plaintiff recovers a judgment, execution shall issue at his request, against the estate of such contumacious attorney, agent, factor, trustee or debtor, for the amount of such judgment as his own proper debt, and the lawful costs; provided that if it appears on the trial that the goods and effects are of less value and the debt of less amount than the judgment recovered against the debtor, judgment shall be rendered against the garnishee to the value of the goods or the amount of the debt, and if it appears that the garnishee has no goods or effects of such debtor in his hands, or is not indebted to him, then he shall recover his lawful costs." Where, as in some jurisdictions, the statute provides that if the garnishee fails to appear he shall be defaulted and judgment rendered against him for the amount of the judgment recovered against the defendant, it is held the default amounts to an admission by the garnishee that he has property in his hands belonging to the defendant, and that he

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may not thereafter make a disclosure unless the default has been removed by the court upon good cause shown. See *Minneapolis etc. R. Co. v. Pierce*, 103 Minn. 504. Under a statute of Arkansas bearing more resemblance to ours it has been held to be error to render judgment by default against a garnishee without proof of his liability. *Lewis v. Faul*, 29 Ark. 470. In *Kerr v. Mayhew*, 7 Haw. 72, it was held that one who is served with process as a garnishee, at his peril neglects to appear and discharge himself in the manner prescribed by statute. But in that case judgment had been rendered against the garnishee as well as against the defendant and the validity of the judgment was not questioned. The motion in that case was treated as an ordinary one to set aside a default. The court said (p. 75), "The applicant was served more than six weeks before the commencement of the term and had ample opportunities to discharge himself from liability, and it is too late now, after judgment has been given against him, to seek to set it aside on any such grounds as are relied upon." There is nothing in our statute to warrant the view that a garnishee who fails to appear is in any worse plight than a defendant who is in default. Both become subject to such judgment as may be entered upon the proofs adduced *ex parte* by the plaintiff. It is clear from the provisions of the statute that in no case shall the garnishee be held liable to judgment and execution for a greater sum than the value of the property of the defendant in his hands or the amount of the debt due to the defendant. In the case at bar the defendant's admission of indebtedness to the plaintiff did not affect the garnishee. The allegation in the plaintiff's complaint that Miyasaki was the attorney, agent, factor, trustee or debtor of the defendant was not admitted by the non-appearance of the garnishee, and much less was the garnishee's failure to appear an admission of indebtedness to the defendant of a sum equal to the amount of the judgment recovered against the defendant. Before a valid judgment can be entered against a garnishee who has not appeared the plaintiff must have shown by evidence that the garnishee is the

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attorney, agent, factor, trustee or debtor of the defendant, and the value of the property in his hands belonging to the defendant, or the amount of the debt due by him to the defendant. The making of such proof is clearly contemplated by the statute in the section last above quoted. The "trial" there referred to includes not only the hearing as to the defendant's liability to the plaintiff, but as to the garnishee's liability to the defendant. The defendant and the garnishee may, of course, be summoned as witnesses. Where judgment has been obtained against the defendant in the case upon his default or confession, the garnishee is entitled to appear and make his disclosure at any time before judgment has been entered against him. And in the case at bar the garnishee may now appear and make his disclosure. From what has been said it follows that the order complained of must be held to have been improvidently entered and should have been set aside upon the garnishee's motion for that purpose.

The exception is sustained and the case remanded to the circuit court with direction to set aside the order for execution and for further proceedings consistent herewith.

H. L. Ross for plaintiff.

Harry Irwin for garnishee.

CONCURRING OPINION OF QUARLES, J.

I concur in the conclusion reached on the ground that there should have been a judgment against the garnishee, and that in the absence of such judgment the circuit court erred in denying the motion of the garnishee to set aside the order directing execution against him.

I am unable to adopt the rule that in case of garnishment and utter failure of the garnishee to pay any attention to the summons that the plaintiff must prove the amount of money or the value of the property which the garnishee holds for the principal defendant. Such has not been the practice in this jurisdiction as I understand it. The garnishee has until the hearing of the case closes—until judgment—to disclose, and if he refuses

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to do so he acts at his peril. If he does not disclose and the plaintiff obtains judgment he (the garnishee) is in default. He cannot be defaulted prior to judgment (*Bank of Hawaii v. Parke*, 15 Haw. 645). The decision in *Kerr v. Mayhew*, 7 Haw. 72, is based upon the idea that if the garnishee fails to disclose—is contumacious—a judgment should be rendered against him, and does not rule that the plaintiff must prove what money or property is in his hands belonging to the principal defendant. Good faith and proper respect for the commands of the writ require the garnishee to appear and disclose in the interest of both himself and the plaintiff.

It is proper practice to require the plaintiff to prove his debt against the defendant, in case of default, his relations with the defendant being within his own knowledge. The relations, however, between the principal defendant and the garnishee are not presumably within the knowledge of the plaintiff and he should not be required to prove what the garnishee owes the defendant or what property the defendant has, where he defaults, and I apprehend that the decision in *Kerr v. Mayhew*, *supra*, is consistent with this reasoning.

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HONOLULU ATHLETIC PARK, LIMITED, A CORPORATION, v. H. G. LOWRY, BILLY ORR, CHARLEY REISBERG, JUSTIN FITZGERALD, ROY McARDLE, JOHNNY KANE, "TOOTS" BLISS, CLAUDE WILLIAMS, LOU KENNEDY, JIM SCOTT, ED. KLEPFER, FRED. DERRICK, DON RADER AND JACK BLISS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. L. WHITNEY, JUDGE.

SUBMITTED JULY 27, 1915.

DECIDED SEPTEMBER 8, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

APPEAL AND ERROR—*final and interlocutory decrees.*

An order made in an injunction suit assessing damages on an injunction bond against a surety thereon, directing that if the complainant does not pay such damages to the defendants to whom awarded, or to the attorneys of such defendants, within ten days, then a judgment to be entered in favor of the defendants against such surety, is an interlocutory order, and not a final decree, hence not appealable, although the order directs the surety to pay the sum awarded into court.

SAME—*final judgment.*

For the purposes of appeal an order, judgment or decree which finally determines the rights of the parties as to the controversy, or some material portion thereof, and provides the means for carrying the order, judgment or decree into effect, is final and appealable.

SAME—*interlocutory order or decree.*

An order, judgment or decree is not final, but interlocutory, when further action by the court is necessary to determine the final rights of the parties as to the matters affected by such order, judgment or decree, and from such order, judgment or decree an appeal does not lie as matter of right, but only by allowance of the circuit judge hearing the cause.

OPINION OF THE COURT BY QUARLES, J.

This is the third appeal to this court in this suit. On the first appeal we affirmed a judgment sustaining a demurrer to the

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original bill of complaint on the part of the defendants other than Lowry, and refusing to permit an amendment as against said defendants and dismissing the suit as to them (ante page 475). On the second appeal we affirmed a judgment sustaining a demurrer to the amended bill of complaint by defendant Lowry and dismissing the suit as to him (ante page 585). The facts, other than stated here, appear in the two former decisions. Upon a dissolution of the temporary injunction as against the defendants other than Lowry, said defendants filed a motion for an award of damages sustained by them, such award to be made upon the bond for the injunction executed on behalf of the complainant by Thomas Treadway, signing as principal, and Henry Hapai, signing as surety. Later the said motion was amended. To the amended motion the complainant and Hapai, the surety, filed their separate pleas to the jurisdiction of the circuit judge, sitting at chambers in equity, to award damages upon the bond, on the ground, among others, that the circuit judge, sitting at chambers in equity, is without power or authority to assess damages upon the dissolution of a temporary injunction. These pleas were overruled and the motion for award of damages, as amended, was heard, the defendants having withdrawn their claim for punitive damages, whereupon the circuit judge assessed the damages of the defendants, other than Lowry, at the sum of \$250, making an order, which, after the preliminary formal portion, is as follows:

"It is ordered, adjudged and decreed that the sum of \$250. be assessed and awarded to the respondents Billy Orr, Charley Reisberg, Justin Fitzgerald, Roy McArdle, Johnny Kane, "Toots" Bliss, Claude Williams, Lou Kennedy, Jim Scott, Ed. Klepfer, Fred Derrick, Don Rader and Jack Bliss as damages under the bond offered and given in behalf of complainant herein, wherein Thomas G. Treadway is named as principal and Henry C. Hapai is named as surety and as and for a reasonable counsel fee of their attorneys in procuring the issuance of the perpetual writ of prohibition in the Supreme Court of the Terri-

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tory of Hawaii prohibiting the enforcing or attempting to enforce said temporary injunction heretofore issued herein.

"It is further ordered, adjudged and decreed that if the respondents Billy Orr, Charley Reisberg, Justin Fitzgerald, Roy McArdle, Johnny Kane, "Toots" Bliss, Claude Williams, Lou Kennedy, Jim Scott, Ed. Klepfer, Fred Derrick, Don Rader and Jack Bliss shall not be reimbursed by complainant herein, the Honolulu Athletic Park, Limited, for the sum of \$250.00 hereinabove assessed and awarded to said respondents within ten days from the entry of the decree, that then and in that event judgment be entered herein in favor of said respondents against Henry C. Hapai for the said sum of \$250. so assessed and awarded as aforesaid, which said sum of \$250. the said Henry C. Hapai shall be, and he is hereby, charged with and ordered to pay into court to the order of said respondents or their attorneys, Lorrin Andrews and C. H. McBride.

"It is further ordered, adjudged and decreed that said respondents have and recover of and from said Honolulu Athletic Park, Limited, complainant, their costs to be taxed in connection with the above assessment and award."

It will be noted that the order awarding damages to the defendants, other than Lowry, is conditioned upon the failure of the complainant to pay the damages so awarded within ten days from the date of the award. From this order the complainant and Hapai, the surety, have appealed to this court. The order is not a judgment or award against the complainant, the Honolulu Athletic Park, Limited, for damages, but only against Hapai, and that conditioned upon failure of the complainant to pay the award within ten days. By agreement the cause was submitted upon briefs. After examining the record the court entertained doubts as to whether the said order or decree was final and appealable and requested counsel for the respective parties to submit additional briefs upon the proposition as to whether said order or decree is interlocutory or final and appealable. In response to such request additional briefs were filed. The appellant insists that the order is final, and therefore appealable, notwithstanding that something remains

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to be done by the court, citing authorities to which we will briefly refer.

In *Mills v. Hoag*, 7 Paige Ch. 18, the court held: "The decree was final and not interlocutory, as it finally disposed of the subject of litigation so far as the court was concerned." In *Long v. Maxwell*, 59 Fed. 948, it was held that a decree for specific performance, concluding all the rights of the parties, is a final decree, notwithstanding that a conveyance which it directs to be made is to be afterwards presented to the judges for their approval as to its form. In the decision it is said: "The decree of July 20, 1891, was, in our opinion, a final decree, terminating the litigation between the parties and leaving nothing to be done, except to carry it into execution. *Bank v. Sheffey*, 140 U. S. 445, 11 Sup. Ct. 755. The reservation for further directions simply related to such execution, and could not be availed of as rendering the decree less final, or leaving open points expressly decided when it was entered." The facts and ruling were similar in the case of *Desvergers v. Parsons*, 60 Fed. 143. In *French v. Shoemaker*, 12 Wall. 86, an injunction suit, the court found the equities in favor of the plaintiff and perpetually enjoined the defendants from using the name of a certain corporation and from interfering with the reorganization of the corporation by plaintiffs. The decree did not, in terms, dismiss defendants' cross-bill. An appeal was taken, and on motion to dismiss the appeal on the ground that it was not a final decree the supreme court held the decree final, notwithstanding the parties might apply thereafter for further proceedings, and refused to dismiss the appeal. In that case the decree settled the rights of the parties and provided the means of executing the decree. It was there held that the failure to dismiss the cross-bill in express terms did not prevent the decree from being a final one as it found against the contentions of the cross-bill. In the decision the supreme court refers to cases of foreclosure of mortgages, treating the decree in such cases as final and appealable notwithstanding a sale under the decree is to be

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reported to the court for confirmation or rejection, and holding that the defendant in such cases should not have to wait until his property had been sold under the decree and the sale confirmed before he could exercise the right of appeal.

The rule enunciated in such decisions is evidently correct for the reason that proceedings after judgment are in the nature of final process for satisfaction of the judgment or decree. (See *Whiting v. U. S. Bank*, 13 Pet. 6, 15.) In *Forgay v. Conrad*, 6 How. 201, the assignee in bankruptcy of one Banks filed his bill to have declared fraudulent sundry deeds to lands and slaves made to some of the defendants, and recovery of certain money fraudulently received from the bankrupt, praying that the deeds be cancelled. The court held the deeds fraudulent and void and rendered a decree decreeing the deeds void and that the possession of the lands and slaves be delivered to the plaintiff, and that the assignee recover the sum of \$11,000 in money, and ordered execution for carrying the decree into effect. In his bill the plaintiff assignee asked an accounting of the profits on the lands and slaves during the time they were wrongfully withheld, and the court in its decree referred the case to a master to take and state an account of the profits received between the date of the filing of the bill and delivery of the lands and slaves to the plaintiff. From the decree the defendants appealed and the plaintiff appellee moved to dismiss the appeal on the ground that the decree was interlocutory and not a final decree from which an appeal could be taken. The supreme court held that the decree was final in so far as it disposed of the controversy as to the validity of the deeds and the possession of the lands and slaves, and therefore appealable, although the cause was retained for the purpose of accounting for profits.

The rule announced in the various Michigan decisions cited in *Hake v. Coach*, 63 N. W. (Mich.) 306, cited by appellant, is well shown by the language of the court in *Lewis v. Campau*, 14 Mich. 458, where the court, in adverting to the difference between interlocutory and final decrees, at page 460 said: "The

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difference between interlocutory and final decrees is this, that in the former further steps are required to be taken to enable the court to adjudicate and settle the rights of the parties, while, under a final decree, the party obtains his rights without any further adjudication on the merits, either by the direct operation of the decree itself, or by means of proceedings of a ministerial character in execution of it."

The correct test for determining whether a judgment or decree is final or interlocutory is well stated by Mr. Black in his work on Judgments, Vol. 1, Secs. 41, 42. When the order, judgment or decree finally determines the rights of the parties as to the controversy, or some material portion thereof, and provides the means of carrying the order, judgment or decree into effect it is final. But "when the further action of the court in the cause is necessary to give completely the relief contemplated by the court, the decree upon which the question arises is not to be regarded as final" (1 Black on Judgments, Sec. 42).

In the case at bar the court expressly directed that the appellees be awarded \$250 damages, and that a decree be entered for the same unless the complainant should pay to the appellees or their attorneys, within ten days, such amount awarded. This left the question of whether the complainant had paid, or had not paid, the said award open to be determined by the court, and left the making of the decree for such award to be made thereafter by the court upon a judicial determination that the amount of the award had not been paid by the complainant. This order was, under the authorities, interlocutory and not appealable without the consent of the circuit judge, and this rule is within the decision of this court in the case of *Tax Assessor v. Makee Sugar Co.*, 18 Haw. 267. That part of the order directing the appellant Hapai to pay the money into court we regard as a mere direction and as surplusage. The order or decree provides no final process for collecting the damages awarded. The award being made *ex contractu* upon an injunction bond, is a debt, the collection of which cannot be enforced by contempt proceedings

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without violating section 10 of the Organic Act. The closing part of the decree awarding the appellees costs, to be taxed against the Honolulu Athletic Park, Limited, in connection with the award of damages, is for no amount of money, and there is nothing in the record showing that such costs have ever been taxed.

There are authorities to the effect that an appeal does not lie from a decree in equity as to the costs merely (*Russell v. Farley*, 105 U. S. 433, and cases there cited; 1 Black on Judgments, Sec. 31). Whether this is the correct rule or not we need not decide, but do hold that the order as to the Honolulu Athletic Park, Limited, is not perfect, complete and final. We hold that the order appealed from is not final and appealable, but an interlocutory one from which an appeal cannot be allowed except by the circuit judge.

For the foregoing reasons the appeal is dismissed with costs to the appellees.

E. C. Peters and *R. J. O'Brien* for complainant.

Lorin Andrews and *C. H. McBride* for defendants.

INOAOLE AHULII v. YIP LAN.

ERROR TO DISTRICT MAGISTRATE OF MAKAWAO.

ARGUED SEPTEMBER 9, 1915.

DECIDED SEPTEMBER 13, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

LANDLORD AND TENANT—summary proceedings—right to possession.

In an action for summary possession of leased land it is incumbent on the plaintiff to show that he is entitled to the immediate possession of the premises.

SAME—parol tenancy—notice to quit.

In an action under Chap. 154, R. L. 1915, the plaintiff should allege and prove, not only that the relation of landlord and tenant

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exists, or has existed, between the plaintiff and defendant, but also how the tenancy was created, and, if by parol, that the statutory notice to quit was given.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a writ of error to review a judgment rendered in favor of the plaintiff by the district court of Makawao, Maui, in an action for the summary possession of leased land. The case for the plaintiff proceeded upon the theory that the defendant was the tenant of certain land of the plaintiff's situate at Waia-koa, Island of Maui, under an oral lease from the plaintiff for the period of six months beginning on June 1, 1914, and was holding over unlawfully. The defendant's contention was that he was in lawful possession of the premises under the exercise of an option for the extension of a prior lease under which he had been holding and which expired on the date above mentioned. As far as we are able to gather from the meagerly reported testimony in the case it would seem that neither of these theories was supported by the evidence, but rather that the defendant was a sub-tenant under one Fat On to whom the plaintiff had leased the property upon the expiration of the previously existing lease. If the situation was as just suggested, a question which has not been discussed by counsel would arise, namely, whether the plaintiff could maintain the action at all. In an action for summary possession of land it is incumbent on the plaintiff to show that he is entitled to the immediate possession of the premises. *Coerper v. Gouveia*, 21 Haw. 270. If the fact be that Fat On had not taken possession and accepted the defendant as his tenant, the plaintiff, presumably, could maintain the action in order to enable her to put her new tenant in possession. However, in view of the state of the record, we make no ruling with regard to this matter, nor in connection with other points raised upon the evidence in the case.

The plaintiff's complaint alleged the existence of the relation of landlord and tenant between the parties, but did not show whether the tenancy had been created by written instru-

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ment or by parol, nor was it alleged that notice to quit had been given. The complaint was defective in not stating the facts. A complaint under chapter 154, R. L. 1915, should show, not only that the relation of landlord and tenant exists, or has existed, between the plaintiff and defendant, but also how the tenancy was created, and, if by parol, that the statutory notice to quit was given. *Hawaii Land Co. v. Scott*, 13 Haw. 385. No objection was made in the court below to the sufficiency of the complaint, but at the close of the plaintiff's evidence the defendant moved for a nonsuit on the ground that notice to quit had not been proven. The statute (R. L. 1915, Sec. 2754) provides that where the tenancy is "by parol" a notice to quit of at least ten days is a prerequisite to the maintenance of the action, so that upon plaintiff's theory of the case, which, in view of the finding of the district court, must be taken also as the theory of the court, proof of the giving of such notice was a necessary part of the plaintiff's case. It was error, therefore, to overrule the motion for nonsuit, and the judgment must on that account be reversed.

The judgment in the case was in the following words: "Court awards judgment for the plaintiff for the possession of the land," and under one of the assignments of error it is argued that the judgment is void for uncertainty. The plaintiff, in her complaint, described the premises in question as "All that parcel of land situate at Waiakoa, Kula, Island of Maui, containing an area of 55 acres, more or less, in the names of Nauliuli and Kanealii, Royal Patent 1210." The Royal Patent was not put in evidence, and the old lease which was introduced contains no further description of the land. And it may be pointed out (which seems to have escaped the notice of counsel) that that lease contained a reservation of three acres. The judgment did not refer to the pleadings or record for a description of the land, and if it had, reference only to a patent which was not in evidence would be found. Under these circumstances there may be room for argument that the judgment was erroneous, or perhaps

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even void, because of its uncertainty, but in view of the reversal of the judgment upon the ground stated, we deem it unnecessary to pass upon this point. If another judgment in favor of the plaintiff be entered it may not be open to the objection which has been raised.

The judgment of the district court is vacated and set aside, and the case remanded with instructions to permit the plaintiff to amend her complaint, if truthfully she can, by alleging that notice to quit was given the defendant in accordance with the requirement of the statute, and thereupon, for such further proceedings as may be had not inconsistent herewith; otherwise to dismiss the action.

D. H. Case and *Enos Vincent* for plaintiff in error.

R. J. O'Brien (*E. C. Peters* and *Eugene Murphy* with him on the brief) for defendant in error.

M. P. ROBINSON, P. MUHLENDORF AND JAMES E. JAEGER, TRUSTEES OF THE ESTATE OF S. C. ALLEN, AND LUCY McWAYNE, v. CHARLES J. MCCARTHY, TREASURER OF THE TERRITORY OF HAWAII.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.
HON. T. B. STUART, JUDGE.

SUBMITTED AUGUST 27, 1915.

DECIDED SEPTEMBER 16, 1915.

WATSON AND QUARLES, JJ., AND CIRCUIT JUDGE ASHFORD IN
PLACE OF ROBERTSON, C.J., DISQUALIFIED.

TAXATION—*inheritance tax*.

By the will of A., who died in 1903, a large residuary estate was bequeathed and devised to trustees in trust for the use and benefit of his widow for life, with power in her to name the person or persons who should succeed to such estate, which power she exer-

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cised by will in 1914; the trustees paid to the territorial treasurer, under protest, on his demand, the inheritance tax imposed by Act 147, S. L. 1909, amendatory of Act 102, S. L. 1905, upon the interest of one of the appointees in the said estate, and, with such appointee, commenced an action to recover the same back from the treasurer; the plaintiffs contended that the inheritance tax for which such interest is liable is that imposed by Ch. 106, S. L. 1892, which was repealed in 1905. Held: The tax was properly collected; that the Act of 1909 applies, it being in force at the time of the transfer under the exercise of the power of appointment, the tax being upon the transfer and not upon the property.

CONSTITUTIONAL LAW—*inheritance tax.*

The statute imposing an inheritance or succession tax upon a transfer under a power of appointment made in contemplation of death, whether the power of appointment was created before or after the enactment of the statute, is valid and constitutional.

OPINION OF THE COURT BY QUARLES, J.

The petitioners commenced this action under the provisions of Act 45, S. L. 1907 (now Sec. 1392 R. L. 1915), to recover back the sum of \$9,773.61, inheritance or succession tax paid the defendant as treasurer of the Territory of Hawaii on the portion of the residuary estate left by S. C. Allen to which the petitioner, Lucy McWayne, succeeded by the terms of the last will and testament of Bathsheba M. Allen, wherein she exercised the power of appointment given her under and by virtue of the last will and testament of S. C. Allen, deceased. With other facts the complaint alleges the following: S. C. Allen died May 13, 1903, testate, leaving an estate, the residue of which, after paying all debts, funeral expenses and special legacies, was of the value of \$2,412,176.26, which he devised and bequeathed to his executrix and executors, also called trustees in his said will, viz.: Bathsheba M. Allen, M. P. Robinson, J. O. Carter and P. Muhlendorf, in trust for the benefit of his said widow, Bathsheba M. Allen, during her life, with power in her to appoint by last will and testament, or codicil thereto, the person or persons who should succeed to such residuary estate after her death; that J. O. Carter, named as an executor

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and trustee, had deceased, and the petitioner, James E. Jaeger, had been duly appointed a trustee under the will of S. C. Allen to succeed the said J. O. Carter, deceased; that under the said power of appointment contained in the will of said S. C. Allen his said widow, Bathsheba M. Allen, by her last will and testament, which, since her death, was duly admitted to probate in the first judicial circuit of the Territory of Hawaii on the 24th day of March, 1914, provided in the 49th article of her said will, set forth in the complaint, as follows:

"FORTY-NINTH: And whereas by the last Will and Testament of my late husband, Samuel Clesson Allen, aforesaid, dated the 5th day of September, A. D. 1900, which said Will upon the decease of my said husband was duly admitted to probate in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on the 6th day of July A. D. 1903, my said husband after making certain specific devises and bequests, devised and bequeathed all the rest, residue and remainder of his property of every description, nature and kind, real, personal and mixed, to me, the said Bathsheba M. Allen, and to Mark P. Robinson, Joseph O. Carter and Paul Muhlendorf, and to my and their successors in trust, upon trust that I, the said Bathsheba M. Allen, should have the use, benefit, enjoyment and income of said residuary estate for and during the term of my natural life, and also provided that upon my death the trustees aforesaid under the Will of my late husband aforesaid should hold the trust estate created thereunder provided I survived him, upon trust for such person or persons in such shares or proportion and otherwise in all respects as I, the said Bathsheba M. Allen should by my last Will and Testament or any Codicil thereto, appoint, and in default of such appointment and so far as any such appointment should not extend or if I, the said Bathsheba M. Allen, should not survive him, upon certain trusts in said Will more specifically set forth;

"And whereas by the death of my said husband and the probate of his said Will and by reason of having survived him, I now have the authority to exercise the power of appointment, conferred upon me under the Will of my husband as aforesaid, and desiring so to do;

"Now, THEREFORE, in the exercise of the powers and author-

ity granted to me by my said husband under his said Will hereinabove recited and by virtue of every other power me hereunto enabling, I hereby appoint that upon my decease the trustees for the time being under the Will of my said husband shall hold the entire trust estate created under the Will of my said husband and then remaining, upon trust that my brother, Mark P. Robinson, and my sisters, Mary E. Foster, Victoria Ward, Matilda Foster, A. (Watty) Jaeger and Lucy McWayne shall have the use, benefit, enjoyment and income thereof for and during the terms of their natural lives, and the survivors and survivor of them for his, her or their natural life or lives (equally while more than one); provided, however, that if my brother or any of my sisters shall die at any time leaving a child or children surviving him or her, then and in every such case until the death of the last survivor of my brother and sisters such child and children (in equal shares while there shall be more than one) shall have the use, benefit, enjoyment, and income of and from the said trust estate created under the Will of my late husband, which the parent of such child or children would take if living, and on the death of the last survivor of my said brother and sisters, I appoint that all the trust estate created under the Will of my late husband, of every description, nature and kind, then remaining, and wheresoever situate, and free and clear of the terms and provisions of the trust hereby created, and of the trust created under the Will of my late husband shall vest absolutely without conveyance or other act or writing from or by the Trustees in all of the children then living of the said Mark P. Robinson, Mary E. Foster, Victoria Ward, Matilda Foster, A. (Watty) Jaeger and Lucy McWayne, said children taking per stirpes, the children if more than one of my brother or any sister taking in equal shares among themselves, and the children then living of any child then deceased of my brother or sisters taking per stirpes by right of representation, so that the children of my brother and sisters who shall be objects of this trust shall take in equal shares per stirpes and not per capita and the children (being objects of this trust) of any child of my brother or sisters having died in the lifetime of my brother or sisters or the survivor of them shall take equally between them the share which the parent would have taken had he or she survived the last survivor of my brothers and sisters aforesaid.

"It being my will that all of the property of my late husband

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which under his said Will is subject to my power of appointment shall go to and vest in the same person and persons and otherwise be disposed of precisely as I have disposed of the trust estate created by me in this Will and covering the residue of my own private property."

The complaint also alleges that it is the defendant's contention that the said residuary estate left by S. C. Allen to his wife, Bathsheba M. Allen, for life, with power of appointment as aforesaid, coalesced with the estate of said Bathsheba M. Allen upon her exercise of said power of appointment and was subject to the inheritance or succession tax provided for by Act 102, S. L. 1905 (Sec. 1323 R. L. 1915), upon the death of Bathsheba M. Allen and the succession of those appointed by her; that the plaintiffs contend that the two said estates did not coalesce upon the death of said Bathsheba M. Allen by reason of her exercising said power of appointment, and that the residuary estate of said S. C. Allen, aforesaid, did not become liable to inheritance tax under said statute, but that the same, real and personal, was liable to inheritance tax under the provisions of Ch. 106, S. L. 1892, as amended by Ch. 21, S. L. 1896, as of the date of the death of S. C. Allen, after deducting therefrom the value of the life interest of said Bathsheba M. Allen, which plaintiffs allege to have been \$1,250,733.89, and that the inheritance tax upon the said residuary estate of S. C. Allen should now be upon the difference between the total amount of said residuary estate and the alleged value of the life interest of Bathsheba M. Allen, viz., the sum of \$1,161,422.37. The plaintiffs admit in their said complaint liability for inheritance tax in respect of the life interest of the plaintiff, Lucy McWayne, in the residuary estate of S. C. Allen, after deducting therefrom the value of the life interest of said Bathsheba M. Allen, in the sum of \$4640.92.

To the complaint of the plaintiffs the defendant has filed his demurrer objecting to said complaint on the ground that it does not set forth facts sufficient to constitute a cause of action in that it shows upon its face that said Bathsheba M. Allen exer-

cised the said power of appointment contained in the will of S. C. Allen, and that such appointment having been exercised subsequent to April 28, 1909, the exercise of the said power of appointment by said Bathsheba M. Allen is subject to the inheritance tax under the provisions of Act 147, S. L. 1909 (now included in Ch. 96 R. L. 1915.)

The circuit judge, being in doubt as to the questions of law raised by the demurrer, has reserved to this court the question as to whether the said demurrer should be sustained on the grounds submitted.

The cause has been ably briefed upon both sides, the briefs showing much labor and research. We have concluded that the question before us resolves itself into the simple question as to whether or not the Act of 1909 (now incorporated into Ch. 96 R. L. 1915) applies, wherein it is provided that an inheritance tax shall be imposed upon "all property which shall pass by will or by the intestate laws of this Territory, from any person who may die seized or possessed of the same * * * or which, or any interest in or income from which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor, vendor, or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons * * * in trust or otherwise * * *." Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after April 28, 1909, such appointment when made, shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will * * *." We have concluded that this statute applies to the case before us, is decisive of it, and, therefore, that the demurrer of the defendant to the complaint of the plaintiffs should be sustained.

By the terms of the statute the tax is upon the transfer by Mrs. Allen under the power of appointment, and to be imposed

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under the terms of the statute where the transfer under the appointment is made after the enactment of the statute, whether the power of appointment was created before or after the enactment of the statute. The power of appointment in Mrs. Allen was created by the will of her husband prior to the enactment of the statute under consideration, but the power was exercised after the enactment of the statute. The interest to which the plaintiff, Mrs. McWayne, succeeded did not vest in her until the death of Mrs. Allen, when the transfer upon which the tax was imposed took place, and depended upon the will of Mrs. Allen who might have appointed some one else to take the particular interest to which Mrs. McWayne did succeed by reason of having been appointed thereto. The tax collected by the defendant as treasurer upon the interest to which Mrs. McWayne succeeded was properly collected under the statute. It was a tax upon the transfer and not upon the property involved (*Brown v. Treasurer*, 20 Haw. 41); it was upon the transfer under an exercise of the appointment and not by virtue of the creation of the power of appointment; hence, so far as this case is concerned, it is not a question of retroactive law. The Act of 1909 (Sec. 1323 R. L. 1915) applies to this particular case, and not Act 106, S. L. 1892, which was repealed in 1905.

The statute here involved has been held valid and not unconstitutional (*Brown v. Treasurer*, supra), and similar statutes have been held to be valid and constitutional. The conclusion that we have reached is supported, among other authorities, by the following: *Estate of Dows*, 167 N. Y. 227; *Orr v. Gilman*, 183 U. S. 278; *Matter of Delano*, 176 N. Y. 486; *Chandler v. Kelsey*, 205 U. S. 466; *Minot v. Treasurer and Receiver General*, 207 Mass. 588; *Attorney General v. Stone*, 209 Mass. 186.

The question reserved is answered in the affirmative.

Holmes, Stanley & Olson for plaintiffs.

I. M. Stainback, Attorney General, for defendant.

Holstein v. Benedict, 22 Haw. 749.

No. 818. THOMAS HOLSTEIN v. PAUL H. BENEDICT, ADMINISTRATOR OF THE ESTATE OF KELUPE SILVA, DECEASED. Error to Circuit Court, Second Circuit. Motion to require attorney to pay costs. Argued July 13, 1915. Decided September 16, 1915. Robertson, C.J., Watson and Quarles, JJ. *Per curiam*. The plaintiff in error, having prevailed, had the costs of court taxed against the defendant in error in this court and thereupon obtained execution therefor against the defendant in error and the same was returned unsatisfied. Plaintiff in error now moves for an order requiring the attorney for the defendant in error to pay into court the amount of such costs, the same to be refunded to the plaintiff in error. Held, that the attorney for the losing party in a case is not personally liable to the successful party for the amount of the costs which have been paid into court by that party. Rule 10 of this court, which provides that "Attorneys shall be liable for costs incurred by their respective clients," was made for the protection of the court and gives rise to no obligation in favor of a party litigant as against the attorney for the opposite party. *Kanahele v. Wakefield*, 11 Haw. 258. Motion denied.

E. Vincent for the motion.

E. R. Bevins, contra.

Nakeu v. Mahaulu, 22 Haw. 750.

KAUMAKA NAKEU, KUEWA WHARTON AND NUI
MOKE KAAEMOKU *v.* HORACE P. MAHAULU
AND ESTHER U. MAHAULU.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. J. ROBINSON, JUDGE.

ARGUED SEPTEMBER 15, 1915.

DECIDED SEPTEMBER 22, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

EQUITY—motion to vacate decree.

An appeal does not lie from an order overruling a motion to open a decree in equity.

OPINION OF THE COURT BY WATSON, J.

This is an appeal from an order made by a circuit judge, sitting at chambers in equity, denying a motion to set aside and vacate a final decree theretofore made and entered in a suit for an accounting, wherein appellants were the defendants and appellees the plaintiffs. The record shows that the bill was filed by appellees on May 14, 1914, to obtain an accounting from appellants as tenants in common of certain lands and premises situate in the city and county of Honolulu, and to recover such sum of money as might be found to be due them as their proportionate share of certain rents, issues and profits alleged to have been collected by appellants from said lands so held by them in common. It was alleged in said bill that appellees were joint owners in fee of an undivided one-half interest in said lands, each owning an undivided one-sixth interest therein, and that the appellants were the owners of the remaining undivided half interest in said premises; that appellants had collected rents from said lands at the rate of \$50 a year from the 9th day of February, 1905, to the date of the filing of the bill, none of which moneys had been accounted for by the said appellees. Upon the filing of said bill a summons was duly issued and served on appellants. On the 11th day of September, 1914,

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nearly four months after the appellants had been served with process, an order of default was entered against them, no appearance having been made by them or either of them. On the 23d day of September, 1914, after the hearing of testimony, a final decree was entered in said cause wherein it was ordered, adjudged and decreed that appellees have judgment against appellant Horace P. Mahaulu for the sum of \$408.75, "being their share of money collected by said Horace P. Mahaulu, as alleged in said complaint, together with interest thereon," and also for costs of court. No appeal was ever taken from the final decree entered on the 23d day of September, 1914, nor was any petition or bill filed to set aside said decree or for a rehearing of said cause. It appears from the uncontradicted affidavit of counsel for appellees, and was admitted by counsel for appellants at the argument, that after said final decree was entered execution was issued thereunder against appellant Horace P. Mahaulu, and the same has been fully satisfied and settled. On the 30th day of April, 1915, a motion was made, entitled in said original cause, to set aside said final decree, one of the grounds of said motion, and the only one relied on in this court, being that such decree was obtained by fraud in that the testimony given at the hearing by Mrs. Kuewa Wharton, one of the appellees herein, and the only witness who testified at the hearing, was false, misleading and fraudulent in certain respects specified in the affidavit of Horace P. Mahaulu, upon which said motion was based. In this affidavit of Mahaulu's he contradicted certain material portions of the testimony given at the hearing by the witness Mrs. Kuewa Wharton as to the amount of rents collected by him from the lands, and also deposed that certain material facts had been concealed by the witness at the hearing, which, if made known to the court, would have resulted in a decree in favor of the appellants. After hearing argument of counsel this motion was denied by the circuit judge and it is from the order denying said motion, dated June 9, 1915, that this appeal is taken.

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Pretermittin all discussion as to whether the relief sought, to wit, the setting aside of a decree in equity, may be properly granted on motion (as to which see 2 Beach, *Modern Equity Practice*, Sec. 884; *Story's Equity Pleadings*, 10th ed., Sec. 426), and assuming, without deciding, that a motion will lie for that purpose, we are of the opinion that the decision of such a motion is within the sound discretion of the court below and that no appeal will lie from it. "Neither an appeal nor writ of error will lie from the refusal of the court below to vacate a judgment or decree. The decision of such a motion rests in the sound discretion of the trial court." 1 Enc. U. S. Sup. Ct. Rep., p. 994, n. 56. In *Wylie v. Core*, 14 How. 1, 14 L. ed 301, Chief Justice Taney, speaking for the court, says: "In relation to the order, it is plain that no appeal will lie from the refusal of a motion to open the decree and grant a rehearing. The decision of such a motion rests in the sound discretion of the court below, and no appeal will lie from it." See also *In re Rouse*, 20 Fed. Cas. No. 12,086. The rule above stated has been adopted and applied by this court in the case of *Makalei v. Himeni*, 7 Haw. 168 (called to the attention of counsel at the argument), and the reason for the rule, as applicable to the case at bar, cogently stated. The court there said: "The justice had the power, on being shown that his proceedings had been erroneous, to reopen the case. It would be a matter lying within his discretion to grant such a motion, likewise to refuse it. * * * Whether a justice will reopen a case for a new hearing after his final decree made and not appealed from, is clearly a matter of discretion. * * * The effect of holding that refusal of such a motion to rehear is appealable, would be to nullify the statutes and rules of court which limit the time for taking appeal to ten days after decree. It would only be necessary at any time to move for a rehearing, and to appeal from the denial of this, bringing up the whole matter before the court in banco, or if the course should be to send it back to the justice for a

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rehearing, then to appeal from his second judgment within the ten days, and so come before this court on the merits."

The appeal is dismissed with costs to the appellees.

Lorrin Andrews for plaintiffs.

N. W. Aluli (*E. K. Aiu* with him on the brief) for defendants.

HALAWA PLANTATION, LIMITED, A CORPORATION,
v. COUNTY OF HAWAII.

ERROR TO CIRCUIT COURT, THIRD CIRCUIT.

HON. J. A. MATTHEWMAN, JUDGE.

SUBMITTED JULY 26, 1915.

DECIDED SEPTEMBER 24, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

COUNTIES—*negligence of employees—demurrer.*

A demurrer to a complaint alleging facts showing an injury to private property resulting directly from the negligence of road employees of a county acting within the scope of their employment is properly overruled. Following decisions in *Matsumura v. County of Hawaii*, 19 Haw. 18 and 496.

DISMISSAL AND NONSUIT—*dilatory motion.*

A motion for nonsuit made after the defendant has introduced evidence in support of his defense comes too late and should be denied on that ground.

DAMAGES—*contributory negligence.*

In an action for damages on account of injury to a growing crop of cane caused by a fire negligently started by defendant's servants on a highway near the plaintiff's cane-fields the fact that the plaintiff, who had no notice that the fire was to be started, had permitted dead grass and dry leaves to remain on the space between such highway and cane-fields would not permit a finding by the jury of contributory negligence on the part of the plaintiff. The requested instruction submitting the question of contributory negligence was properly refused.

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OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced this action to recover from the defendant county damages for loss and injury to a growing crop of cane caused by fire alleged to have been negligently started by road employees regularly employed and authorized to repair a road near the property of the plaintiff by the defendant. To the complaint the defendant demurred upon the grounds that the complaint did not state facts sufficient to constitute a cause of action; that the defendant, being a body corporate and politic, is not liable for the alleged negligent acts; that repairing roads is a governmental function, and that defendant is not liable in the exercise thereof for wrongful or negligent acts of its servants or employees; that there is no statute under which defendant can be held liable. The plaintiff joined in the demurrer which was overruled by the court. The defendant's answer is a general denial. The cause was tried before the court and a jury. At the close of the evidence the defendant moved for a nonsuit, which was denied. The defendant then moved for a peremptory instruction to find for the defendant, which motion was also denied. The jury returned a verdict in favor of the plaintiff upon which judgment was regularly entered. The defendant moved for a new trial on the ground that the verdict is contrary to law, contrary to the evidence and contrary to the weight of the evidence, which motion for a new trial was denied. The cause comes here upon writ of error. We summarize the assigned errors as follows: The court erred (1) in overruling the demurrer; (2) in overruling the motion for nonsuit; (3) in overruling defendant's motion for a directed verdict; (4) in giving plaintiff's requests for instructions Nos. 1, 2, 3, 5, 6 and 7; (5) in failing to instruct the jury upon the question of contributory negligence, and (6) in overruling defendant's motion for a new trial.

1. The demurrer was properly overruled. The complaint alleged probative facts showing that the road employees of the defendant, acting within the scope of their employment, negli-

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gently started a fire on a highway near the cane-fields of plaintiff; that the space between the point where the fire was started and such cane-fields was covered with inflammable material—dry grass and lauhala leaves—and that the fire spread to said cane-fields and destroyed a large amount of cane to the injury and damage of the plaintiff. The facts alleged show negligence on the part of the servants of the defendant and that such negligence was the proximate cause of the injury alleged. The liability of the defendant county for such negligence is settled in this jurisdiction by the decisions in *Matsumura v. County of Hawaii*, 19 Haw. 18 and 496. We are inclined to believe that we would hold otherwise if this was a case of first impression, but, the rule that a county is liable for the injury to private property caused by the negligent acts of its road employees, acting within the scope of their employment, having been announced in the first decision in the *Matsumura* case (19 Haw. 18), and reaffirmed in the same case in the later decision (19 Haw. 496), and the legislature having met in four regular sessions since the announcement of such rule without enacting any statute adopting a different rule, we must consider that the legislature has acquiesced in the rule announced.

2. The motion for a nonsuit was properly overruled on the ground that it was made after the defendant had introduced evidence in support of its defense, and came too late. Said motion was based upon the same grounds stated in defendant's demurrer to the complaint.

3. The defendant's motion for a directed verdict was based principally upon the ground that the defendant as a body corporate and politic is not liable for the negligent acts of its employees, acting within the scope of their employment, and was properly denied for the reasons heretofore given for overruling the demurrer.

4. We have carefully examined the instructions given by the court at the request of the plaintiff, complained of, in connection with the entire charge of the court to the jury, and find

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no error therein. Defendant's objection to the said instructions is based principally upon the ground that the defendant, being a body corporate and politic, is not liable to plaintiff for the negligent acts of defendant's road employees, which position is untenable.

5. The defendant requested the court to instruct the jury upon the question of contributory negligence to the effect that although the jury should find that the injury to the plaintiff was caused by certain specified acts of negligence of the employees of the defendant, yet, if the jury should find from the evidence that the plaintiff was negligent in permitting the space intervening between the road where the fire was started and the cane-fields of the plaintiff to remain covered with dead grass and leaves from lauhala trees there growing, that this was contributory negligence on the part of the plaintiff and that the verdict should be for the defendant. This request was properly denied. It involved the proposition that it was the duty of the plaintiff to keep a space outside of its cultivated fields clear of inflammable material, and failing to do so could not recover for damages sustained by the negligence of defendant's road employees in starting a fire on the road contiguous to such inflammable material. It is apparent that the fire was not started by accident, but intentionally and for the convenience of defendant's servants. The authorities cited by the defendant in support of the aforesaid proposition are cases where fires have been started from sparks emitted by steam engines running upon railways. We do not consider those authorities applicable to the case at bar for the reason that in such cases the adjoining owner has knowledge that fires are liable to occur from accident by the emission of sparks from steam engines daily traveling along the railway and he should take the precaution to keep inflammable material off of his own premises within the known danger zone. Here no such known danger existed and the plaintiff had no reason to apprehend danger to its property from fires likely to be started by accident, and the injury that it sustained was not

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caused by fire started by accident. The law does not require any one to take precautions against unknown intentional wrongful acts of another, nor make it his duty to presume that another will intentionally do a wrongful act that will result in injury to his property. If the failure of the plaintiff to keep the intervening space between the highway and its fields clear of leaves and dead grass is contributory negligence it is such by reason of some rule of law imposing this duty upon it, in which event such failure might be held, as matter of law, to have contributed to the injury sustained. The requested instruction was based upon the presumed existence of such rule of law, but we know of no authority to sustain it under circumstances like those shown to have existed in the present case. We are therefore unable to hold that the court erred in refusing to give the requested instruction, and hold that the same was properly refused.

6. The motion for a new trial was based upon the same theory and grounds as were the demurrer to the complaint and the motion for a directed verdict in favor of the defendant, and, for the reasons hereinabove given, was properly denied. None of the assignments of error are sustained.

We desire to call the attention of counsel and of the clerks of the circuit courts to the condition of the record in this case, and do so for the reason that we find a growing laxity in the preparation of records on appeal to this court. There is in the record here much that should be left out, the presence of which is inconvenient to this court. For instance, there is a lengthy brief in the record which was presented to the trial court upon the hearing of the demurrer, which has no more place in the record here than would a stenographic report of the arguments of counsel. We find a copy of a motion to set the case for trial, together with the cover and all endorsements thereon in the record. There are literal copies of five subpoenas, one of them *duces tecum* consisting of three pages, with the covers and return of the officer serving same, the five covering twenty-one pages and swelling the transcript beyond what it should be in

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size. To each of these unnecessary documents the clerk has appended a formal certificate of its correctness as a copy, and has appended such certificate to each pleading, motion, the verdict, judgment, etc., so that we find in the record nineteen certificates by the clerk authenticating copies, whereas one at the end of the transcript authenticating them, naming each in the order in which it is found in the record, would be sufficient and would make the record shorter and more convenient.

The trial court did not endorse on the requests for instructions handed in by the respective parties those given and those refused, nor did it show which were given in part and refused in part, or the modifications of any given, as required by Sec. 2439, R. L., which statute seems to have been ignored in this case. The only way in which this court is enabled to ascertain whether a requested instruction was given or not is by comparing it with the charge given by the court and then examining the clerk's minutes to see whether such request was presented and whether given or refused. Compliance with the statute referred to would have saved this court considerable labor and inconvenience.

The judgment is affirmed.

W. H. Heen, Deputy County Attorney of Hawaii, for plaintiff in error.

Holmes, Stanley & Olson for defendant in error.

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DAVID PALAKIKO v. COUNTY OF MAUI.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

SUBMITTED SEPTEMBER 23, 1915.

DECIDED SEPTEMBER 27, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

BAIL AND RECOGNIZANCE—*cash deposit.*

An accused, lawfully arrested and charged with the commission of a criminal offense, who voluntarily deposits a sum of money in lieu of bail and thereby procures his discharge cannot, after the deposit has been forfeited and paid into the county treasury, recover the same back.

OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced this action in the district court of Wailuku to recover from the defendant county \$30 deposited as cash bail in a criminal case and which was forfeited and paid into the county treasury. The case was submitted on a stipulation of facts wherein it appears that the plaintiff, who is an unmarried man, and a certain married woman were lawfully arrested by the deputy sheriff of Hana on the 22d day of March, 1915, upon the charge of adultery, whereupon the plaintiff inquired the amount of bail desired, and, upon being told by the deputy sheriff that it was \$30, voluntarily deposited that amount of cash with the officer; that on the following day a proper and lawful complaint duly sworn to was filed charging the plaintiff and said married woman with adultery, a warrant of lawful arrest was issued against the plaintiff and a formal and legal charge of such offense was preferred and entered on the record of the district court for the district of Hana against the plaintiff and said married woman. The plaintiff failed to appear and an order was made forfeiting the cash bail deposited, and the same was by the district magistrate of Hana paid into the treasury of the defendant county. In this action the district magistrate of Wailuku gave judgment in favor of the defendant, from which judgment the plaintiff has appealed to this court on

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the question of law whether it is lawful to admit to bail persons accused of crime by accepting a cash deposit of money in lieu of bail.

It is argued on behalf of the plaintiff that there being no statute authorizing the acceptance of a cash deposit in lieu of bail that it was unlawful for the deputy sheriff to accept such cash bail; that the defendant acquired no title to it; and that the plaintiff may recover the same from the defendant county. In support of plaintiff's contention we are cited to 3 Am. & Eng. Enc. L. 682, and authorities cited in notes; and to 3 R. C. L. 28, and authorities there cited, as well as other authorities. The authorities hold that it is not lawful for an officer, in the absence of statutory authority, to accept a cash deposit in lieu of bail, and this ruling we regard as correct. The important question here is, can the plaintiff, if in *pari delicto*, recover the money back after he has procured his release from custody by reason of such deposit. He made the deposit voluntarily, and not under duress as alleged in the complaint, as appears from the stipulated facts. He was released from custody and received a benefit from the transaction which he now claims to be unlawful. He had the option of giving bail with surety, as provided in our statutes, or of remaining in custody. By agreement between himself and the officer, in lieu of giving a bail bond he made the deposit of cash and we see no element of duress in this case. The arrest was lawful, as shown by the agreed facts, and the only point upon which he now seeks a recovery of the money deposited by him and which was covered into the county treasury, is that there is no statute in this jurisdiction authorizing a cash bail or a deposit of money in lieu of bail. We have carefully examined the authorities cited in the notes to the texts above referred to and find that nearly all, if not all, of them are easily distinguished from the case at bar, while some of them announce what we consider a correct rule, namely, that where an accused has been lawfully arrested and procures his unlawful discharge by voluntarily making a deposit

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of cash in lieu of bail, without statutory authority, his release is unlawful, and he, being in *pari delicto*, cannot recover the same after it has been covered into the treasury.

We will briefly review the authorities relied on to support the plaintiff's contention. In *Snyder v. Gross*, 69 Neb. 340, it was held that where the wife of an accused deposited with the justice of the peace cash in lieu of bail to procure his enlargement, there being no statute to authorize such deposit, out of which deposit a small fine assessed against the accused was paid, a portion of the deposit paid a third party on the order of the accused, and the balance paid by the justice of the peace to the accused, his sureties were not liable to the wife of the accused in an action by her on the official bond of the justice of the peace, but that the justice was liable. In *Butler v. Foster*, 14 Ala. 323, the circuit judge made an order that the accused, one McAllister, be enlarged until his trial upon his depositing with the clerk of the court \$500 in money and giving his recognizance, without surety, in the sum of \$1000. It was held that the order was void as to the deposit, as the circuit judge could not delegate his authority to accept bail; that the clerk and sureties on his official bond were not liable either to the state or county for the deposit and that the clerk accepted the money as bailee of the accused who could recover it from the clerk. In *Eagan v. Stevens*, 39 Hun 311, it was held that where the recorder took money deposited in lieu of bail, without authority of law, he was liable to the accused for the money. In *Reinhard v. City*, 49 Ohio St. 257, it was held that where an accused was arrested before any warrant issued against him, and was required to deposit money with the officer to secure his appearance before the mayor the following morning, it was incumbent on the city, in an action by the accused to recover the amount of the deposit, to prove that the arrest was lawful. In *City of Columbus v. Dunning*, 41 Ohio St. 602, S. was in custody, her bail fixed at \$75; she deposited in lieu thereof cash and failed to appear, whereupon the deposit was by order forfeited, and was, less the cost,

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covered into the treasury. A creditor of S. sued her and garnished the city. It was held that the mayor was not authorized to accept money in lieu of bail; that the city having received the money at the request of S. and disbursed it in due course, was not her debtor and was not liable for the deposit. In *United States v. Faw*, Fed. Cas. No. 15,078 (1 Cranch C. C. 486), the defendant, a justice of the peace, was indicted for taking personal recognizance of one charged with a felony and releasing him on such recognizance, and it was held that he had no authority to enlarge an accused charged with a felony on bail and had no authority to accept a cash deposit for such purpose. In *State ex rel Grass v. White*, 40 Wash. 560, 2 L. R. A. N. S. 563, it was held that a justice of the peace who had arrested a fugitive from justice wholly without legal warrant could not legally demand from him a bail bond or a cash deposit of bail. In *Applegate v. Young*, 62 Kans. 100, a justice of the peace, without authority, received cash in lieu of bail, did not pay the money into the treasury, but retained it, and there was no order forfeiting the deposit. In an action by the accused against the justice of the peace it was held that the justice was liable. In *State v. Mitchell*, 151 N. C. 716, it is said: "The law contemplates that a defendant may give security for his appearance, and it would be singular indeed if he was denied the right to deposit the requisite cash as security for his appearance. The court could not compel the defendant to deposit cash or to give security of any kind. He had the privilege to go to prison if he preferred. Having tendered the cash, and it having been accepted by the court as security for his appearance, it would be extraordinary if the defendant, still a fugitive from justice, could have it returned to him, upon the theory that the court erred in accepting it." In *McNamara v. Wallace*, 89 N. Y. Suppl. 591, it was held that where a police justice without jurisdiction accepted cash bail from a witness, his act was void and he was personally liable to the witness for such deposit, placing the decision on the ground of public policy. In *State v. Owens*, 112 Iowa 403, and in

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State v. Anderson, 119 Iowa 711, it was held that a statute authorizing a defendant to deposit cash in lieu of bail did not authorize a third party to make such deposit on behalf of the defendant; that the defendant was not entitled to a discharge upon a deposit being made by a third party, and in case the deposit was returned to the depositor neither the state nor the county could recover it. In *State v. Farrell*, 83 Iowa 661, a sheriff received a sum of money to deposit with the clerk in lieu of bail and failed to do so and it was held that neither the state nor the county could recover the same from the sheriff. The Iowa cases were decided under statutes whose provisions have not been enacted into law in this jurisdiction, hence these decisions are not applicable here. In *County of Rock Island v. County of Mercer*, 24 Ill. 35, it was held that money deposited with a sheriff as security for the appearance of the prisoner who makes default was to be treated as if it had been recovered on a recognizance. The decision in *Brasfield v. Milan*, 127 Tenn. 361, 44 L. R. A. N. S. 1150, supports the contention of the plaintiff. In *Smart v. Cason*, 50 Ill. 195, it was held that an accused who secured his discharge by depositing cash with the sheriff could not recover back the money deposited, he being in *pari delicto*. This ruling was followed in the case of *Cooper v. Rivers*, 95 Miss. 423 (48 So. 1024), and is followed in some of the cases hereinbefore cited.

The principle was recognized in the case of *Goo Yee v. Rosenberg*, 21 Haw. 513, that in case of an illegal transaction, where the parties are in *pari delicto*, courts will not aid one party in recovering from the other, although in that case the plaintiff, having been misled into believing that the transaction was lawful, was regarded as less guilty than the defendant and permitted to recover money paid under an illegal contract.

In the case at bar we consider that the plaintiff, so far as the illegality of the transaction complained of by him is concerned, stands in *pari delicto*—equally guilty with the officer accepting the cash deposited in lieu of bail—and under the author-

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ities quoted is not entitled to recover the money from the defendant under the facts and circumstances of this case.

In a very short brief filed on behalf of the defendant by the deputy attorney general the contention of the plaintiff seems to be virtually conceded. We think that counsel for the respective parties have entirely overlooked the controlling principle in this case, and upon which we have decided it. The question before us, irrespective of the form in which it is presented by the certificate of appeal, is as to the correctness of the judgment. We are of the opinion that the judgment appealed from is correct.

The judgment is affirmed with costs to the defendant appellee.

E. R. Bevins for plaintiff.

L. P. Scott, Deputy Attorney General, for defendant.

No. 870. IN RE ASSESSMENT OF TAXES, CATHOLIC MISSION. Appeal by tax payer from tax appeal court, third taxation division. Argued September 28, 1915. Decided September 30, 1915. Robertson, C.J., Watson and Quarles, JJ. *Per curiam*. The appellant returned certain land situate at Hilo at \$14,686. It was assessed at \$40,725 and the court below sustained the assessment. The appellant now contends that the value of the property does not exceed \$24,435. There was evidence to sustain the conclusion of the tax appeal court that the assessment did not exceed the full cash value of the land, and the presumption is that the judgment appealed from was correct. *Hawi M. & P. Co. v. Forrest*, 21 Haw. 389. Counsel for the appellant has not convinced us that it was wrong. The fact that other properties in Hilo have been assessed too low, if the assessment in question was made in good faith, which is not denied, does not afford a reason for reducing the assessment. *Chilton v. Shaw*, 13 Haw. 250. It is contended that the statute (R. L. 1915, Sec. 1236) which requires that real and personal

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property shall be assessed at its "full cash value" has not been lived up to by the assessors in the Hilo district, but that they have habitually assessed property at less than its full value. Whether that fact, if it be a fact, would justify this court in reducing the assessment we are not required to determine as the record in the case does not establish the fact. The decision of the tax appeal court is affirmed.

W. S. Wise for the tax payer.

A. A. Wilder for the assessor.

LEWERS & COOKE, LIMITED, A CORPORATION, v.
WONG WONG, MORRIS ROSENBLDT, FRED
HARRISON AND HONOLULU SKATING RINK,
LIMITED, A CORPORATION.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.
HON. T. B. STUART, JUDGE.

SUBMITTED JULY 7, 1915.

DECIDED SEPTEMBER 30, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

MECHANICS' LIENS—*construction of statute.*

The rule applicable to the construction of a mechanic's lien statute is that the requirements which are to be met by persons who may assert the lien must be strictly complied with, but that the remedial portions of the statute are to be liberally construed.

SAME—*lien upon lessor's interest in leased land—covenant to erect building.*

Under Chap. 162, R. L. 1915, where land is leased for a term of years and the lease contains a covenant on the part of the lessee to erect thereon a certain building which will revert to the lessor upon the determination of the lease, and the right of reentry upon non-payment of rent or other breach of covenant is reserved, the lessor and lessee are both "owners" within the meaning of the statute, and the lien of a material man who has furnished to the contractor materials which were used in the construction of the building will attach to the interest of the lessor in the land as well as to that of the lessee.

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OPINION OF THE COURT BY ROBERTSON, C. J.

(Watson, J., dissenting)

In its complaint in an action to enforce a mechanic's lien the plaintiff alleged, *inter alia*, that the defendant Wong Wong is indebted to plaintiff in the sum of \$2586.61, being the balance due for certain materials sold and delivered to the defendant; that said materials were used in the construction of a certain building on a parcel of land (describing it) situate on Fort street, in Honolulu; that the defendants Rosenbledt and Harrison are the owners of said land and building; and that the defendant Honolulu Skating Rink, Limited, holds a lease of said premises for the term of five years from November 1, 1914, which was duly recorded in the office of the registrar of conveyances in Honolulu. The lease referred to, dated the 21st day of September, 1914, demised the premises in question for the term of five years from November 1, at the monthly rental of \$250, and contained the following among other covenants on the part of the lessee: That "it shall and will within two months from the date hereof cause to be constructed and completed upon the said demised premises in a good and workmanlike manner, of the best materials of their several kinds, a one-story frame building; that it shall and will expend in the construction of said building not less than the sum of \$6000, and the floor as to location, size, and material shall be as the lessors may approve," also that "at the end of said term hereby demised or other sooner determination of this lease, it will peaceably deliver up to the lessors possession of the said demised premises, together with all erections and improvements upon or belonging to the same, by whomsoever made, in good repair, order and condition." And the lessors reserved the right to reenter in case of non-payment of rent or other breach of covenant. A demurrer having been interposed, the circuit court reserved for the consideration of this court three questions which involve the point whether the plaintiff has stated a cause of action against the defendants

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Rosenbledt and Harrison as for a lien upon their interest in the land.

Section 2863 of the Revised Laws, 1915 (Chap. 162, Liens), provides as follows:

“Any person or association of persons furnishing labor or material to be used in the construction or repair of any building, structure, railroad or other undertaking shall have a lien for the price agreed to be paid for such labor or material (if it shall not exceed the value thereof) upon such building, structure, railroad or other undertaking, as well as upon the interest of the owner of such building, structure, railroad or other undertaking in the land upon which the same is situated.”

The contention advanced on behalf of the above named defendants is that the word “owner” in the statute means “constructing owner,” and hence that the lessors’ interest in the land is not subject to the lien asserted in this case because, as contended, there was no contract with the lessors for the erection of the building in the construction of which the materials furnished by the plaintiff were used.

First, as to the spirit in which the statute is to be construed. In *Lucas v. Redward*, 9 Haw. 23, 25, and *Allen & Robinson v. Redward*, 10 Haw. 151, 159, it was held that the statute, being in derogation of the common law, is to be strictly construed. See also *Emmeluth v. Au In Kwai*, 20 Haw. 180, as to notice of claim, and *City Mill Co. v. Horita*, 21 Haw. 585, as to the description of the property. In the case first named the ruling was made in connection with the contention that a notice of lien when filed would relate back to the time when the materials were furnished and take precedence over an intervening garnishment. In the second case it was made in connection with the contention, which was disapproved, that the lien attaches for the value of material furnished to be used in a certain building or improvement though it was not in fact so used. We do not doubt that the cases cited were correctly decided upon the ground that the prescribed requirements which are to be met by persons who may assert the lien must be strictly complied with, and the conditions which

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give rise to the lien must be clearly shown to exist. The reasonable view, we think, is that stated in 20 Am. & Eng. Enc. Law, 278, as follows: "The nearest approach to a general rule which can be safely laid down would seem to be that the remedial portions of mechanic's lien statutes should be liberally construed, but that the other parts, those upon which the right to the existence of a lien depends, being a derogation of the common law, should be strictly construed." See *Davis v. Alvord*, 94 U. S. 545, 549; *Russell v. Hayner*, 130 Fed. 90, 92; *St. Louis, etc., R. Co. v. Love*, 86 S. W. (Ark.) 395, 398; *Nanz v. Park Co.*, 103 Tenn. 297, 300; *Elwell v. Morrow*, 28 Utah 278, 289; *Clement v. Adams, etc., Co.*, 75 S. E. (Va.) 294; *Hill v. Kaufman*, 98 Md. 247, 253. "The statute upon the subject is remedial in its nature, and while courts require a strict compliance with all that the statute prescribes for the completion or perfecting of the lien, and cannot by construction supply any failure or omission upon the part of the claimant, and to this extent may be said to place a strict construction upon the statute, as being an innovation upon the common law, yet when the mechanic has done all that it is necessary for him to do, has performed the work or supplied the material, and perfected his lien therefor in the prescribed mode, the duty of the courts is to see that those whom the law intended to protect shall enjoy the advantages which it confers." *Bristol, etc., Co. v. Thomas*, 93 Va. 396, 400. "And this liberal construction applies to the subject-matter—that is, the property to which the lien attaches and against which it may be enforced." *Nanz v. Park Co.*, supra. In the case at bar it is not disputed that the plaintiff, as the furnisher of material used in the construction of the building in question, is within the class to whom it was intended to give the special remedy, nor is it claimed that any of the conditions precedent to the assertion of the lien have not been complied with. We are considering the statute in its remedial aspect, and that, as above shown, calls for a liberal construction.

The question is whether the plaintiff's lien attaches to the

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interest of the lessors, as well as that of the lessee, in the land upon which the building was erected. This court has already noted that our statute is so different from other statutes on the subject that but little assistance can be derived from the adjudicated cases in other jurisdictions. *Lucas v. Redward*, supra; *Emmeluth v. Au In Kwai*, supra. In this jurisdiction it has been decided that though the lien is given by statute, and not by contract (*Hackfeld & Co. v. Hilo R. Co.*, 14 Haw. 448, 451; *Lucas v. Hustace*, 20 Haw. 693), it is dependent upon and does not exist in the absence of contract. *Allen & Robinson v. Reist*, 16 Haw. 23. The owner must have contracted for the improvement, and the material man must have furnished the material pursuant to a contract, but there need not have been a contract between the owner of the land and the material man. There may be several contracts. Only in the sense and to the extent suggested need the owner of the land be the "contracting owner." In the case at bar the lessors' contract was with the lessee, and it, on the other hand, contracted with the builder, who, in turn, contracted with the material man. The requirement that there must have existed a contractual relation was, therefore, met. The case hinges upon the meaning of the word "owner" as used in the above quoted statute. The word "is a general term the precise meaning of which depends on the nature of the subject-matter and the connection in which it is used." *Magoon v. Lord-Young Eng. Co.*, ante, p. 338. It may include a lessor as well as a lessee. 28 A. & E. Enc. Law 234; *Good v. Jarard*, 43 L. R. A. N. S. (S. C.) 383, 387; *Alley v. Lanier*, 41 Tenn. 540, 543. The word "owner" in the statute includes, of course, the plural. There may be more than one owner, and such, we think, is the case here. There is nothing in the statute, nor in the nature of things, to exclude the idea that both the lessor and the lessee of land may subject their respective interests therein to a lien in favor of a material man. We take it that counsel for the defendants would concede that if a lessor and a lessee jointly contracted with a builder for the erection

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of a building upon the demised premises the interests of both would be subject to the operation of the statute. We think that where, as in this jurisdiction, a contract between the owner of the land and the material man is not necessary, the same result follows in case the lessor, as part of the consideration of the contract of lease, has exacted a covenant from the lessee to the effect that he will erect a certain building or structure upon the land, which upon the expiration or sooner determination of the lease, is to become the property of the lessor. See 27 Cyc. 58; *Henderson v. Connelly*, 123 Ill. 98; *Paulsen v. Manske*, 126 Ill. 72; *Arctic Lumber Co. v. Borden*, 211 Fed. 50. We think a holding that the lien attaches to the lessors' interest in the land accords with the spirit of the statute, and is warranted by the letter of the law. Where land is leased and the parties to the lease have provided for the erection of a building upon such terms as are embodied in the lease in this case, it is to be regarded as a joint or mutual enterprise in which, within the meaning of the statute, construed with reasonable liberality, the lessors and the lessee are the owners to the extent of their respective interests in the land. The covenant requiring the erection of the building at the expense of the lessee is regarded as forming part of the consideration of the lease. The lessors, thus, were parties to the erection of the building, and the lessee was their agent, not for the purpose of creating any personal liability against them, but to cause the improvement to be placed upon the land. The lessors are presumed to have contemplated the possibility of a lien and subjected their interest in the land to the operation of the statute. This view does no violence to any provision of the statute, but secures to the material man, pursuant to principles of equity and fair dealing, the protection sought to be extended by the legislature in behalf of such persons who have added value to the property of another under and pursuant to contracts duly made and entered into to that end. The only burden imposed upon the lessors who are to receive the ultimate benefit of the improvement is that which, by reason of their own

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contract, they ought and are presumed to have contemplated. The lessors presumably have their remedy against the lessee if it has failed on its part to fully perform its agreement. It has been suggested that the provision contained in section 2868 of the statute, that "Whenever the work or material for which a lien is filed shall be furnished to any contractor for use as set forth in section 2863, the owner may retain from the amount payable to the contractor sufficient to cover the amount due or to become due to the person or persons who filed the lien," tends to show that the lien attaches only to the interest of the owner who personally made the contract for the erection of the improvement. We are unable to adopt that view. The provision quoted is an incidental one and ought not, as we think, to narrow the construction to be given section 2863. Under the ruling above announced this latter section may operate in full effect in all cases where it is properly applicable.

The questions reserved are, accordingly, answered in the affirmative.

Castle & Withington for plaintiff.

E. C. Peters and *R. J. O'Brien* for defendants.

DISSENTING OPINION OF WATSON, J.

I am unable to agree with the majority in their holding that the plaintiff in this case is entitled to a lien upon the interest of the lessors in the land upon which the building was erected. As I read the foregoing opinion the majority arrive at the conclusion that the lessors' interest is subject to the lien on the theory that the tenant, by reason of the covenant in the lease requiring him to erect a building on the leased premises, thereby became the agent of the owners "to cause the improvement to be placed upon the land." If this proposition could be conceded then I should be inclined to agree with the views announced by the majority. But to my mind the better reasoned authorities do not in the absence of a statute support this theory of agency. In *Lucas v. Hustace*, 20 Haw. 693, 695, this court said: "Some

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statutes granting liens * * * have perhaps been supported upon this theory of agency and consent of the owner. That, however, is not the theory prevailing in Hawaii." And in discussing the doctrine of certain Pennsylvania cases the court, on page 697, said: "These proceed upon the theory of agency and consent, above referred to, have been disapproved by the supreme court of the United States and are in conflict with the view already taken by this court * * * as to the method of the creation of the lien and the theory upon which the law is to be upheld." In this Territory there is no such statutory agency as existed in Oregon when in the case of *Lumber Co. v. Nolan*, reported in 143 Pac. 935, the supreme court of that State held that "if the owner of the fee contracts with his tenant * * * compelling the latter to erect a building an agency is created as against the owner of the fee *by force of the statute*, with the result that one who furnishes material or labor at the instance of the agent is entitled to a lien on the fee for the labor or materials furnished." The cases of *Albaugh v. Litho-Marble Decorating Co.*, *Lumber Co. v. Morris*, and *Cornell v. Barney*, hereinafter cited, were referred to in the *Nolan* decision and distinguished on the ground that in those cases the matter of statutory agency was not involved, nor is it in the case at bar. In the case of *Albaugh v. Litho-Marble Decorating Co.*, 14 App. Cas. D. C. 113, the syllabus states the views of the court on that subject as follows: "A covenant in a lease for the erection by the lessee of a building on the leased premises, to become the property of the lessor at the end of the term, without charge to the lessor, her heirs or assigns, does not create the relation of principal and agent between the lessor and lessee, so as to bind the lessor and her property for the contracts of the lessee made in the performance of the covenant, and under such circumstances a bill in equity to enforce a mechanic's lien against the leased property for work and labor done for the lessee in the erection of the building is maintainable only against the leasehold interest." On page 120 the court says: "This covenant (to improve) involves no theory

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of agency but quite the reverse. The parties to the lease dealt with each other, not as principal and agent, but practically as adverse parties." In *Morrow v. Merritt*, 16 Utah 412, the court, in treating the question of the supposed agency of a lessee under facts which bring the case on all-fours with the one at bar, says at page 414: "It does not appear that Calder (the lessor) authorized Merritt (the lessee) to make the improvements at his expense or to furnish the materials or to perform the labor for him. The relation of principal and agent did not exist between them." See also *Lumber Co. v. Morris*, 170 Mo. App. 212, 221; *Block v. Murray*, 12 Mont. 545; *Cornell v. Barney*, 94 N. Y. 394; *Francis v. Sayles*, 101 Mass. 435; 2 Jones on Liens, Sec. 1280 and cases cited n. 3; Boisot on Mechanics' Liens, Sec. 291 and cases cited n. 144.

In my opinion the reserved questions, which involve only the point whether a lessee who is bound by the terms of the lease to make specified improvements on the leased premises may be considered the agent of the lessor so as to subject the reversion of the lessor to mechanic's liens therefor, should be answered in the negative.

TERRITORY OF HAWAII v. TAN YICK.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED SEPTEMBER 23, 1915.

DECIDED SEPTEMBER 30, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

STATUTES—*exception—office of.*

An exception in a statute excludes from the purview a person or thing included in the words. Its office is to draw away from the operation of the statute matters which would otherwise be included.

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WORDS AND PHRASES—*“without.”*

The word “without” as used in R. L. 1915, Sec. 3897, does not imply an exception.

INDICTMENT AND INFORMATION—*material allegations—circumstances of aggravation.*

Where there are several phases of the same kind of crime with varying circumstances of aggravation it is not necessary in an indictment for the simpler offense to negative circumstances of aggravation embraced in the graver.

SAME—*indecent assault.*

In an indictment for indecent assault under R. L. 1915, Sec. 3897, it is not necessary to allege that the assault was committed “without committing or intending to commit the crime of rape.”

CRIMINAL LAW—*indecent assault—proof—defense.*

Under an indictment for indecent assault it is not necessary for the prosecution to prove that the offense was committed without the intent to commit rape. Nor is it a defense to such charge that the evidence shows that the defendant did intend to commit rape.

OPINION OF THE COURT BY ROBERTSON, C. J.

(Quarles, J., dissenting)

The plaintiff in error was convicted by a jury under an indictment which charged that he, on the 31st day of December, 1914, “unlawfully, feloniously and without authority or justification by law, did take indecent and improper liberties with the person of one Maria Lau Chong, an unmarried female child under the age of twelve years; and he, the said Tan Yick, also sometimes known as and called Ah Chick, did then and there and thereby commit the crime of indecent assault.”

The assignments of error go to the denial by the trial court of defendant's motion, made at the conclusion of the evidence, to direct the acquittal of the defendant on the ground that the indictment charged no offense under the laws of this Territory; and to the refusal of the court to give certain instructions requested by the defendant, and the giving of an instruction as requested by the prosecution.

Section 3897 of the Revised Laws, 1915, provides as follows: “Whoever takes indecent and improper liberties with the per-

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son of a female child under the age of twelve years without committing or intending to commit the crime of rape shall be deemed guilty of indecent assault and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or imprisonment at hard labor for not more than five years or both." It will be noticed that the charge stated in the indictment did not include the words "without committing or intending to commit the crime of rape" used in the statute. The absence of those words from the indictment furnished the ground for the defendant's motion for a direction of acquittal. The instructions requested by the defendant, and which the court refused to give, were to the effect that it was incumbent upon the prosecution to prove that the defendant did not rape or intend to rape the prosecuting witness, and that if the jury should find from the evidence that at the time of taking indecent and improper liberties with the girl the defendant did intend to commit the crime of rape the verdict should be "not guilty." The court instructed the jury that it was necessary for the prosecution to prove only that the defendant did take indecent and improper liberties with the person of the girl at the time and place charged, and that she was an unmarried female child under the age of twelve years. No evidence was offered on the part of the defense but there was evidence on the part of the prosecution from which the jury could have found that at the time of the committing of the assault the accused did intend to have sexual intercourse with the prosecutrix, though the intention appears not to have been carried out. The claim that errors were committed as assigned rests upon the one contention that the phrase contained in the statute "without committing or intending to commit the crime of rape" is an essential ingredient of the offense created by the statute which it was necessary to allege in the indictment, and was required to be proved at the trial. Counsel argues that the words just quoted constitute an exception, and he relies upon the familiar rule that where a statute contains an exception which is so incorporated in the

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definition or description of the offense defined as to be a material part of it, the indictment must negative the exception. We are of the opinion, however, that the words in question do not constitute an exception, and, therefore, that the rule invoked does not apply. Anderson, in his law dictionary, says that an exception "in a statute, excludes from the purview a person or thing included in the words." The office of an exception is to draw away from the operation of the statute matters which would otherwise be included. *United States v. Cook*, 17 Wall. 168, 177; *Campbell v. Jackman*, 140 Ia. 475, 480; *Pabst Brewing Co. v. Milwaukee*, 148 Wis. 582, 587; *Rowell v. Janrrin*, 151 N. Y. 60, 67. We think such is not the effect of the words used in the statute above quoted. The statute, which was originally enacted as Act 128, S. L. 1911, was intended, as we believe, to meet a class of cases involving young girls in which the charge usually made was of assault with intent to commit rape, and where, owing to the difficulty of proving the specific intent, and the absence of statutory authority for a conviction of assault without such intent, under such an indictment, acquittals were often the result. Another section of the same act (now R. L. 1915, Sec. 3898) provided that under an indictment charging rape, or the carnal abuse of a female child under the age of twelve years, or assault with intent to commit either of those offenses, the jury may find the defendant guilty of an indecent assault as defined in the section above quoted. The statute of 1911 was reenacted as part of chapter 224 of the Revised Laws, 1915, wherein are also included the sections relating to rape, the carnal abuse of a female child under the age of twelve years, and assault with intent to commit rape or to carnally abuse such child. The punishment prescribed under section 3896, for an assault with intent to rape or to carnally abuse is the same as that under section 3897, for indecent assault, i. e., a fine not exceeding one thousand dollars or imprisonment not more than five years, or both. The object of the legislature seems to have been then, not only to authorize a con-

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viction of the newly defined offense of "indecent assault" where, under an indictment charging rape or an assault with the specified intent, the evidence may fall short of establishing the entire charge, but of providing for the indictment, in the first place, of persons for taking "indecent and improper liberties with the person of a female child under the age of twelve years" irrespective of the intent with which it was done. The phrase contained in the statute which is claimed to constitute an exception begins with the word "without." In the case of *Evans v. McFarland*, 186 Mo. 703, 725, it was said, "A proper gloss of the word 'without' does not require it to be read as meaning 'unless' or 'except.' Good usage permits its meaning to be, when employed in a correct propositional sense, 'independently of' 'otherwise than with.' " The phrase in question was not intended to take out of the operation of the statute anything which would otherwise be included in it, but as part of the description of a hitherto undefined offense which was added to the category of sexual crimes. It is a part of the description of the newly created offense, but whether it is a part that must be proved we will consider later. Section 3791 of the Revised Laws, 1915, provides that "No indictment for any offense shall be held insufficient for want of the averment of any matter unnecessary to be proved." So far as the pleading is concerned the case would seem to fall within the general rule that "where there are several species of the same general crime with varying circumstances of aggravation and subject to a gradation of punishments, it is not necessary to negative such circumstances." 22 Cyc. 346. In *Com. v. Squire*, 1 Met. 258, there was an indictment for malicious burning. The statute provided that "Every person who shall wilfully and maliciously burn * * * any banking house, store * * * or other building whatsoever, of another, other than is mentioned in the third section, shall be punished," etc. It was held that the indictment was not defective because it did not contain the words "other than is mentioned in the third section." See, to the same effect, *State v.*

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Ambler, 56 Vt. 672. In *Devoe v. Com.*, 3 Met. 316, the charge was of house breaking. The statute provided that "If any person, in the night time, shall break and enter any shop, warehouse, or office, not adjoining to or occupied with a dwelling house," etc. The contention that the indictment was defective because it did not aver that the office alleged to have been entered was "not adjoining to or occupied with a dwelling house," was not sustained. In *People v. Durkin*, 5 Park. Cr. Rep. 243, the statute relating to arson in the second degree provided that "Every person who shall wilfully set fire to or burn in the night time any shop, warehouse or other building, not being the subject of arson in the first degree," etc. The count in the indictment upon which the defendant was convicted did not state that the building set fire to was not the subject of arson in the first degree. But the court held (p. 250) that the words "not being the subject of arson in the first degree" did not create an exception, but "were only intended to distinguish between the different degrees of the same general offense." Though the rule just adverted to mentions the "gradation of punishments," the real test is the intention of the legislature to distinguish between different phases of the same kind of crime, and the rule applies though, as here, the punishment prescribed for the aggravated degree is the same as that for the particular offense charged. See *Larned v. Com.* 12 Met. 240. This is not a case where a statute has condemned an act when done with a specific intent. In such a case, under the rule that every material fact or circumstance embraced in the definition of the offense in question must be stated in the indictment, the presence of the specific intent must be alleged. Under our statute the intent with which an indecent assault is committed is immaterial.

Counsel for the plaintiff in error, in connection with his contention that the jury was misdirected, argues that in a charge under section 3897 it is necessary for the prosecution to prove, as well as to allege, a lack of intent on the part of the accused to commit rape, and, hence, that if in any case the evidence

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shows that rape was committed, or that the intent to commit it was present, it would be a complete defense to the charge and the accused would be entitled to an acquittal. Clear and unmistakable language would have to be used by the legislature before the court would be warranted in attributing to it the intention that evidence of the commission, or the intent to commit, the crime of rape would constitute a defense to a charge of indecent assault. The rule of law, in the absence of statute, is that it is no defense to an indictment that the facts in proof show that the defendant committed an offense of a higher degree than that charged. *Com. v. Smith*, 151 Mass. 491, 495; *Com. v. Hogarty*, 141 Mass. 106, 110; *People v. Durkin*, *supra*. An analogy is found in the law of homicide. Manslaughter is the unlawful killing of a human being without malice, but under an indictment for manslaughter it is not necessary for the prosecution to prove that malice did not exist. And so it was held in the case of *Com. v. McPike*, 3 Cush. 181, that it is no defense to an indictment for manslaughter that the evidence shows that the defendant committed murder. Upon the same principle it was held in *Com. v. Creadon*, 162 Mass. 466, that a defendant may be convicted on an indictment charging an assault with intent to commit rape even though the evidence showed his crime was rape. And in the case of *State v. Hamey*, 168 Mo. 167, 203, it was decided that under an indictment charging carnal knowledge of an unmarried female between the ages of fourteen and eighteen years, it is no defense that the evidence showed that rape was committed.

The intention of the legislature was to condemn the act of taking improper and indecent liberties with the persons of female children under the age of twelve years. Whether or not the person indicted, at the time he committed the assault, entertained an intent to go farther is immaterial. Proof of the commission of rape, or of an assault with intent to commit rape, would, as it did in the case at bar, prove the taking of indecent

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and improper liberties with the person of the prosecutrix. The defendant was not surprised or otherwise prejudiced in his defense, and he cannot very well complain because he was not accused of having intended to commit rape. We hold that it was not necessary to either allege or prove that the assault was committed without committing or intending to commit rape.

The judgment of the circuit court is affirmed.

Eugene Murphy for plaintiff in error.

E. R. Bevins, County Attorney of Maui, for defendant in error.

DISSENTING OPINION OF QUARLES, J.

The indictment in this case, in my opinion, failed to state any crime or offense against the defendant, failing to state the intent with which the defendant committed the acts charged against him, did not allege the offense described and forbidden by section 3897, R. L. The words contained in that statute, to wit, "without committing or intending to commit the crime of rape" are descriptive of the crime, a new one, created by such statute. The indictment did not charge a simple assault, as defined in section 3874, R. L., in that there is no allegation of "a malicious attempt forcibly to do a corporal injury to another without authority or justification by law." It did not allege the acts which constitute a crime under section 3896, R. L., in that it failed to allege a malicious assault with intent to commit the crime of rape and did not allege that defendant "maliciously" assaulted any female child under the age of twelve years with intent to ravish or carnally abuse such child. It did not state an offense under section 3897, R. L., the statute under which this prosecution was evidently instituted, in that the indictment was wholly silent as to the intent of the defendant. The offense created by section 3897, R. L., is a revolting one, and one which should be subject to severe punishment, and the legislature has very properly prescribed the same punishment for the offense

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created by this statute as is prescribed for an assault with intent to commit rape. Nevertheless it is such an old and established principle of criminal procedure that an indictment against an accused must state with particularity all of the essential elements and ingredients of the crime charged against him that it would seem unnecessary to discuss this rule. In the crime of indecent assault, defined and prescribed by section 3897, R. L., as well as in the crime of assault with intent to ravish, defined and forbidden in section 3896, R. L., the question of intent is a material and necessary ingredient. In the one case the intent to commit or attempt to commit the forbidden act must exist; in the other the intent not to commit the crime of rape must exist. The indictment in this case fails to charge the felony defined in section 3897, R. L., in that the intent with which the acts alleged were done is entirely omitted, and the words "without committing or intending to commit the crime of rape" are a necessary part of the description and are descriptive of the new crime created by this statute enacted in 1911.

When intent is made a part of the definition of the crime it is one of the ingredients of such crime and such intent must be alleged in the indictment else the indictment does not state an offense. *State v. Bacon*, 7 Vt. 219, 222; *United States v. Gleason*, Woolw. 75, Fed. Cas. 15,215; *People v. Lohman*, 2 Barb. 216, 218; *Brittin v. State*, 5 Eng. (10 Ark.) 299; *Sarah v. State*, 28 Miss. 267; *State v. Gove*, 34 N. H. 510; *State v. Freeman*, 6 Blackf. 248; *State v. Drake*, 1 Vroom 422; *Morrow v. State*, 10 Humph. 120.

"Where the intention is made a material ingredient in the offense, it is always necessary to allege it." *State v. Ullman*, 5 Minn. 1, 5. And to the same effect see also the following authorities: *Johnson v. State*, 1 Tex. App. 146; *Howard v. State*, 8 Tex. App. 447; *Drake v. State*, 19 Ohio St. 211, 217; *State v. Malloy*, 5 Vroom 410; *Wood v. State*, 46 Ga. 322; 1 Arch.

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Cr. Prac. & Pl. (7th ed., 1860), 282-285 and authorities cited in notes.

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. *United States v. Hess*, 124 U. S. 483, 486. * * * This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to or to impede or obstruct the due administration of justice in the circuit court; but it states, as a legal conclusion from the previous allegations, that the defendants conspired so to obstruct and impede * * * but the indictment nowhere made the direct charge that the purpose of the conspiracy was to violate the injunction or to interfere with the proceedings in the circuit court." *Pettibone v. United States*, 148 U. S. 197, 202, 203. The court held that the indictment did not state an offense.

"So far as relates to the charge of felony, there is no allegation that the defendant used the means to procure the abortion *with intent thereby to destroy the child*. * * * That is a part, and, as we deem it, an essential part of the definition of the offense contained in the Act of 1846. When a particular intent accompanying an act is requisite to constitute a crime it should be averred in the indictment." *People v. Lohman*, 2 Barb. at p. 218, citing 6 East. Rep. 473, 4; 1 Chit. Cr. Law 233.

"It is a well established general rule of criminal pleading in relation to offences created by statute, that where the words of the statute are descriptive of the offence, the indictment must follow, substantially at least, the language of the statute, and expressly charge the respondent with the commission of the offence as described, or it will be defective. The respondent must be brought within the material words of the statute, and

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nothing will be taken by intendment. Wharton's Cr. Law, 185, and authorities; 1 Chitty's Cr. Law, 281, 2, 3; 1 Archb. Cr. Plead. 50; *People v. Allen*, 5 Denio 76. * * * Where a particular intent is essential to constitute a crime that intent must be distinctly alleged in the indictment. *People v. Lohman*, 2 Barb., S. C. 216; *Gabe v. State*, 1 Eng. 519; *Commonwealth v. Morse*, 2 Mass. 128." *State v. Gove*, 34 N. H. 510, 515. To the same effect see *United States v. Staats*, 8 How. 41, 44; *United States v. Carll*, 105 U. S. 611; *Evans v. United States*, 153 U. S. 584, 594; *United States v. Britton*, 107 U. S. 655, 669; *Spurr v. United States*, 174 U. S. 728, 735.

"The particular intent must, therefore, be left to the jury to be determined by all the facts in the case, and should not in this case be given to them as a legal presumption. It must be remembered that this act is only criminal if done with a particular intent, and that intent must, therefore, be alleged and proved according to all the terms of the statute." *State v. Malloy*, supra, citing *Commonwealth v. Dana*, 2 Metc. 329; *Miller v. People*, 5 Barb. 203; *Commonwealth v. York*, 9 Metc. 93; 1 Arch. Prac. & Pl. 119-121; 3 Greenl. Ev., Sec. 13; 1 Stark. Ev., 524. These authorities hold that the intent must be proven, but that it may be proven by proof of the actions and surrounding circumstances of the defendant.

"It is a general principle of evidence that a man shall be taken to intend that which he does, or which is the immediate and natural consequence of his act. But where an act in itself indifferent becomes criminal if it be done with a particular intent, then the intent must be alleged and proved. The intent in the present case was a material ingredient in the offense, and was a question of fact, under all the circumstances, for the consideration of the jury. It was for them to find whether there had been an intentional, wanton and indecent exposure of the persons of the defendants, at such a time and place, and in such a manner,

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as to offend against public decency." *Miller v. People*, 5 Barb. 203.

The trial court erred, in my opinion, in refusing to instruct the jury to find for the defendant on the ground that the evidence showed that the defendant was not guilty of taking "indecent and improper liberties with the person" of one Maria Lau Chong, an unmarried "female child under the age of twelve years, without committing or attempting to commit the crime of rape." The indictment failing to allege an essential ingredient in this statutory crime, stated no criminal offense against the defendant and he was, in my opinion, entitled to be discharged, and the court should have given the request for an instructed verdict.

The evidence shows conclusively that the defendant did not commit the crime of indecent assault, as defined in section 3897, R. L., but did commit the crime of assault with intent to ravish, as defined in section 3896, R. L. Now by section 3898, R. L., the legislature has provided that under an indictment charging rape or carnal abuse of a female child under twelve years of age, or charging assault with intent to commit either of such offenses, the jury may find "the defendant guilty of an indecent assault *if the facts so warrant*." Now the facts to warrant conviction of an indecent assault must show that it was committed without committing rape, and without intending to commit rape. The two offenses are of a diverse nature. The intent necessary to create the one proves conclusively that the other was not committed. In the one *the intent to commit rape* must exist; in the other *the intent not to commit rape* must exist. The words of the statute, "without committing or intending to commit rape," are descriptive and definitive of the very nature of the acts constituting the offense and do not constitute an exception to a general rule prescribed by the statute, but are of the essence of the general rule applicable to all persons committing the acts forbidden by the statute.

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I am unable to concur in the majority opinion wherein it holds that the question of intent is immaterial, as I understand it to hold. What the legislature said, and evidently intended to say, is, that where a defendant is prosecuted under an indictment charging rape, carnal abuse of a female child under twelve years of age, or assault with intent to commit rape, if the facts showing an indecent assault are proven but the proven facts and circumstances do not show intent to rape or carnally abuse the female child upon whom the assault is allaged to have been made, the defendant may be convicted of indecent assault. The legislature has nowhere provided that under an indictment charging an indecent assault the defendant may be convicted of rape or carnal abuse of a female child under twelve years of age, or of an assault with intent to commit either of such crimes. That is what has occurred in this case, without warrant of law, in my opinion. It would be just as reasonable to hold that a man charged with assault might be convicted of homicide as it is to hold that a man charged with an indecent assault may be convicted of an attempt to commit rape.

The offense shown by the evidence in this case to have been committed by the defendant constitutes a heinous crime against good morals, decency and the best interests of society and merits severe punishment. Nevertheless, the defendant in this, as in all other cases, should be lawfully convicted according to established rules of law and procedure. In my opinion the judgment should be reversed and a new trial granted.

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TERRITORY OF HAWAII v. D. P. MCGREGOR.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED SEPTEMBER 25, 1915.

DECIDED OCTOBER 7, 1915.

ROBERTSON, C.J., WATSON AND QUARLES, JJ.

WITNESS—protection of by the court.

Where the trial court is convinced that a witness does not understand a question it should explain the question or cause it to be explained to the witness. The court should protect a witness from confusion by questions that place a wrong construction on previous statements by the witness.

EVIDENCE—parol. to prove provisions of an ordinance.

Parol evidence is not admissible, under the rule requiring the best evidence obtainable, to prove provisions in a municipal ordinance.

APPEAL AND ERROR—interrupting the examination of witness.

A party has no inherent right to complete an examination or cross-examination of a witness without interruption by the court; it often happens that the court should interfere with such examination or cross-examination in order to protect the witness against improper treatment and for the proper administration of law.

SAME—refusing oral request for instruction.

The trial court properly refused to consider an oral request for an instruction made in open court before the jury; all requests for instructions are required to be in writing.

SAME—instructions to jury.

It is not error to refuse a request for a proper instruction when the question of law presented by the requested instruction is covered by another instruction given by the court to the jury.

SAME—stating grounds of exception.

It is not error for the court to refuse to permit counsel, who has excepted to an instruction given by the court of its own volition, to state the ground of his exception in the presence of the jury on the ground that in order to have the exception considered by the appellate court it was necessary to state the grounds of the exception, as under our practice a general exception to a specified instruction is sufficient. This is a matter within the discretion of the court, and while it would be proper to permit counsel to state the grounds of an exception, it would not be

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proper to permit counsel to incorporate in his exception argumentative matter as to the correctness or incorrectness of the instruction to which the exception is directed.

CRIMINAL LAW—*heedless driving—instruction to jury.*

It is proper to instruct the jury that in determining whether the defendant was guilty of heedless driving as charged they should take into consideration the time and place of the offense charged as to light or darkness; the presence or absence of other vehicles on the highway at the time; the width of the highway; the condition of the vehicle driven by defendant as to equipment; the defendant's manner of driving; and, all of the surrounding circumstances as shown by the evidence.

OPINION OF THE COURT BY QUARLES, J.

The defendant was charged in the district court of Honolulu with the offense of heedless driving, the charge being that the defendant on the 26th day of June, A. D. 1914, wilfully, furiously and heedlessly of the safety of others did drive a certain vehicle, to wit, Auto 1502, upon that certain highway, to wit, Kalakaua Avenue in said Honolulu, and then and there imminently endanger the personal safety of one Lorrin K. Smith, etc. The defendant was convicted in the district court, took an appeal to the circuit court, was tried before the court and a jury and again convicted and sentenced to pay a fine of \$100. The case comes to this court upon exceptions, thirty-two in number. Many of the exceptions are without sufficient importance to require special mention and we will treat the exceptions in a general way, endeavoring to pass upon all questions that are material or at all important to a determination of the case.

Exceptions to the action of the trial court in explaining to a witness that the question relative to a portion of the highway where the offense was alleged to have occurred related to that portion of the highway makai of a strip of parking shown by the evidence to run through the center of the highway, are without merit. Where the trial court is convinced that a witness does not fully understand a question it should explain or

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cause the question to be explained to the witness. This is simple justice to the witness and to the parties.

The exceptions relating to the action of the court in refusing to permit traffic officers to state what they did in controlling traffic upon the said highway at other times than the time at which the offense was alleged to have been committed are without merit, as such evidence was immaterial and therefore not admissible.

The exceptions to the court's refusal to permit parol evidence as to provisions in city ordinances were without merit. The objection to such evidence on the ground that it is not the best evidence was properly sustained. The defendant assumed that another automobile than the one driven by himself and the one with which he collided was wrongfully on the mauka portion of the highway, as divided by the strip of parking, while headed in the direction of Waikiki, and sought to introduce evidence to show that the traffic officers did not compel the driver of such machine, which had been stopped by them on account of not being lighted, to drive it off of the highway, which evidence, being objected to as immaterial, the court refused to admit it, to which the defendant excepted. The evidence sought to be introduced was not material to the issue of heedless driving charged against the defendant and was properly refused admission.

During the trial a question arose between counsel for the defendant and a witness on examination as to a statement made by the witness, and the court remarked that the examination was not fair to the witness; that the witness made a certain statement at one time and another at another time and that counsel could examine the witness as to the difference between the statements; the trial judge remarking that the question put by counsel to the witness did not properly interpret what the witness had stated, to which remark the defendant excepted on the ground that the objection was made by the court and not by counsel for the prosecution. This exception, being placed solely upon the ground stated, is overruled. The trial court should

protect witnesses against confusion by questions that place a wrong construction on statements which they have previously made. At the same time a trial judge should abstain from all appearance of partisanism in trials, civil and criminal.

The offense was committed about eleven o'clock at night, if committed at all. During the trial counsel for defendant asked a witness if it was (referring to the time of the commission of the offense) as "light as day," when the court remarked that the court, jury and everybody knew that it was not as light as day at the place in question at eleven o'clock at night else there would have been no occasion for installing lights there; and that everybody knows that no number of lights had had the effect of making the city as light as day. To these remarks of the court the defendant excepted on the ground that it was prejudicial to the defendant. The court was talking about a matter of common knowledge which the jury might well consider, and we see no prejudicial error. In this particular, it would have been far better if the court had ruled that the question was not admissible and had refrained from arguing the matter before the jury.

While the defendant was testifying in his own behalf on direct examination he was asked by his counsel if he was drunk at the time of the occurrence in question, and replied that he did not think he was drunk; thereupon the court remarked to counsel that it might be well for the defendant to give, for the benefit of the jury, his idea of what constitutes drunkenness and how many drinks he had had at the time. Counsel for the defendant excepted to the action of the court in interrupting his examination of the defendant. The court then made a few observations as to the conduct of the trial and proceeded to ascertain from the witness his ideas as to being drunk or not being drunk. The defendant excepted to the actions of the court in this matter on the ground that his examination was not concluded by his counsel when the court propounded its questions and was overruled. Counsel for the defendant, in his brief,

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argued that the action of the trial court in this regard indicated an opinion that the defendant was guilty, and that such remarks "were an infringement of the right of the defendant to complete cross-examination and examination" of witnesses without interruption. We see no intimation of an opinion as to the guilt or innocence of the defendant on the part of the court in its remarks, and do not consider that they were prejudicial to the defendant. A defendant has no inherent right to complete an examination of a witness in his behalf or the cross-examination of an adverse witness without interruption, and it frequently happens that it becomes the duty of the court to interfere. Such interference, however, should occur only when necessary, and trial courts should permit counsel on both sides to conduct their cases, with such restraint only as is proper to protect a witness when improperly treated, and for a proper administration of law.

One of the exceptions is to the action of the court during the argument of counsel for the defendant to the jury, and before the jury had been instructed as to the law, the court interrupting counsel and saying to the jury: "At this point the court will be obliged to instruct the jury that it is an offense against the law, for which a penalty is prescribed, for a person in an intoxicated condition to operate an automobile in a public place." This was clearly error. The court should have waited until the case was closed before charging the jury as to the law of the case upon any feature. The exception is a general one, but in the brief of counsel for the defendant it is argued that it amounted to a comment upon the evidence by the court. We cannot, in the condition of the record, take that view. To determine the probable effect of the language of the court upon the jury it is necessary to know what counsel for the defendant said immediately preceding the remarks of the court complained of in the exception. That should have been, but is not, shown in the exception itself. The error committed by the court, however, was corrected in the final charge to the jury wherein the

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jury were instructed that "The defendant is not on trial for driving an automobile while under the influence of liquor or in a state of intoxication, and the mere fact, if you believe it to be a fact, that he was intoxicated * * * would not justify you in finding him guilty of heedless driving."

The defendant, after the arguments of counsel to the jury, and after the case had been closed except as to charging the jury, orally requested the court to instruct the jury to disregard all evidence as to the general use of the mauka portion of the highway, either in going to or coming from Waikiki, on the ground that it contravened ordinance 56 of the city and county of Honolulu, which had been introduced in evidence. The exception itself is silent as to whether the request was oral or in writing, but it refers to page 123 of the transcript of the stenographer, where an examination discloses that it was oral and the court stated that it would consider no requests for instructions which were not in writing. The court was correct in such ruling.

The defendant requested a peremptory instruction to find for the defendant, which request was by the court properly denied. The evidence was amply sufficient to warrant a verdict of guilty and the court would not have been authorized to take the case from the consideration of the jury by instructing them as requested.

We have carefully examined the instructions requested by the defendant that were refused by the court, as set forth in the bill of exceptions, and compared the same with the charge given by the court, and find no errors in refusing such requests for instructions unless it be the refusal of the court to give the request for instruction set forth in exception 19, which we will later consider. In the case of *Halawa Plantation, Ltd., v. County of Hawaii*, ante, p. 753, we had occasion to call attention to the record failing to show endorsements upon requests for instructions given and refused, and showing modifications of requested instructions which had been modified and given as

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modified. The record here does not contain all requests for instructions given and refused, with endorsements thereon showing the action of the court with reference to them, as required by section 2439, R. L. An exception in a bill of exceptions should not set forth in full a request for an instruction, but should refer to it in such manner that the court can from the record tell what particular request is referred to in the instruction, and state the ground upon which the exception is based. All instructions requested, with the endorsement of the court showing whether refused or given or modified, should be sent to this court with the record.

The request for instruction shown in defendant's exception No. 19 is as follows: "You are further instructed, Gentlemen of the Jury, that the mere fact that there was a collision between the automobile driven by defendant and the one being driven in front of him, that such fact alone and of itself does not show that defendant was guilty of heedless and reckless driving—in other words, that the mere fact of collision does not prove negligence, heedlessness or recklessness—but I instruct you that before you are justified in finding the defendant guilty as charged you must find that he was such in fact under the facts and under the circumstances now given you." This requested instruction was proper and should have been given, and unless the principle embodied in it, to the effect that the mere fact of a collision was not sufficient evidence upon which to find the defendant guilty of heedless driving, was given to the jury in the charge of the court in some form, the refusal to give this instruction must be regarded as prejudicial error. However, the general tenor of the charge, considered as a whole, was that the defendant could only be found guilty upon evidence showing that he had heedlessly driven his car as charged, and there is nothing in the charge itself which holds out the idea that he could be convicted merely by reason of the fact that the car driven by him collided with another car. The charge, as a whole, negatived that idea. The court charged the jury, *inter*

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alia, as follows: "You are not justified in finding the defendant guilty as charged merely because the evidence shows, if it does show, that one Lorrin K. Smith was injured in the collision which has been testified to before you, but that, before you are justified in finding the defendant guilty, his guilt must be established beyond a reasonable doubt." The evidence showed, without conflict or contradiction, that Smith was in the car which defendant's automobile ran into, and the jury could readily see from the charge, as a whole, that they were not to find defendant guilty by reason of the "mere fact that there was a collision between the automobile driven by the defendant and the one being driven in front of him." While it would have been proper for the court to give the requested instruction, yet the failure so to do, we are convinced from the record as a whole, did not prejudice the defendant or bring about the verdict against him. The charge, taken as a whole, covered the requested instruction under consideration, and was as favorable to the defendant, if not more so, than the law authorizes. The gist of the law, as given in the charge of the court, was that in determining from the evidence whether defendant was guilty as charged the jury should take into consideration the time and place of the offense charged; the condition of the vicinity as to light or darkness; the condition of defendant's automobile and his ability to stop it by means of the brakes with which it was equipped; his manner of driving the car and whether or not he could have avoided the collision by slowing down or by stopping or turning his auto so as to avoid striking the car with which he collided. These principles we regard as sustained by authority. It is not the rate of speed or velocity with which a car is traveling that determines whether it is being driven heedlessly or not. { A high rate of speed upon a broad highway, at the time unoccupied, and which causes no danger to life or property, might not be heedless driving, while a much lower rate of speed upon a narrow highway, upon which other vehicles are standing or traveling, especially at night, whereby life is endangered, would be, under the statute,

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heedless driving. The charge of the court, given to the jury, left to them the determination of the reasonableness of the actions of the defendant, under all of the surrounding circumstances, and this we regard as proper.

Certain exceptions are based upon the refusal of the court to permit counsel for the defendant to state the grounds upon which he excepted to certain portions of the charge of the court, given on its own motion at the close of the trial. Counsel for the defendant contends that it was necessary to state such grounds in order to have the exceptions to such portions of the charge considered by this court. A general exception to a specified instruction is sufficient under our practice to authorize this court to consider the exception and determine the correctness of an instruction given or the action of the court in refusing an instruction. Section 2439, R. L., gives the respective parties the right to argue the correctness or incorrectness of requests for instructions presented by the respective parties "previous to the court passing thereon." This does not apply to the charge of the court given on its own motion. Discussion as to the propriety of giving instructions, after they have been given in the presence of the jury, is not contemplated by our procedure. It is within the discretion of the trial court to permit or refuse to permit counsel to state the grounds of an exception to an instruction in the presence of the jury at the time it is given, but counsel should not be permitted to argue the correctness or incorrectness of instructions by including argumentative matter in stating the grounds of an exception to an instruction.

The exception to the verdict on the ground that it is contrary to law, contrary to the evidence, and contrary to the law and the evidence, is not sustained. As hereinbefore stated, the evidence was amply sufficient to warrant the verdict of guilty as charged against the defendant.

Finding no prejudicial error in the record authorizing a new trial, the exceptions are overruled.

E. C. Peters and *R. J. O'Brien* for the Territory.

C. H. McBride for defendant.

RULES OF THE SUPREME COURT.

RULE 3. BRIEFS.

(as amended October 4, 1915).

1. Within fifteen days after an appeal case has been placed on the calendar the appellant shall file a printed or typewritten brief and two copies thereof and a certificate or acknowledgment of service of a copy thereof upon the appellee. This brief shall contain, in the order here stated, (a) a concise abstract or statement of the case presenting succinctly the facts, the questions involved and the manner in which they are raised. (b) A specification of the exceptions or assigned errors which are relied upon. When the error alleged is to the admission or to the rejection of evidence the specification shall state the substance of the evidence admitted or rejected. When the error alleged is to the charge of the court the specification shall set out the part referred to in full, whether it be instructions given or instructions refused. (c) A brief of the argument exhibiting a clear statement of the points of law or fact to be discussed and the authorities relied upon in support of each point. When evidence is referred to the page or pages on which it appears in the transcript shall be stated.

2. Within ten days after receipt of a copy of the appellant's brief the appellee shall file a printed or typewritten brief and two copies thereof and a certificate or acknowledgment of service of a copy thereof on the appellant. This brief shall be of like character with that required of the appellant except that no specification of errors shall be required and no statement of the case unless that presented by the appellant is controverted.

3. Within five days after receipt of a copy of the appellee's brief the appellant may file a brief confined strictly to matter in reply to the appellee's brief.

4. Every brief of more than 25 pages shall contain on its front fly leaves a subject index with references to the pages of the brief.

5. As to cases of reserved questions. In cases in which a single question has been reserved, the party maintaining the affirmative shall, for the purposes of this rule, be regarded as the appellant and his opponent as the appellee. So also where there are several questions and the one party has the affirmative as to all of them. Where several questions have been reserved as to which a party maintains the affirmative as to some of them and the negative as to others, the plaintiff (or petitioner or movant) shall be regarded as the appellant and the defendant (or respondent) as the appellee, unless, upon application to the court, a special order shall be made.

6. It will be a sufficient compliance with the foregoing provisions of this rule if the briefs are deposited in the mail, duly postpaid and addressed to the office address of the clerk or opposing counsel, as the case may be, in time to reach such address in due course of mail within the times limited in said provisions.

7. When, according to the foregoing provisions of this rule, an appellant is in default, the case may be dismissed; and when an appellee is in default, he will not be heard, except on consent of his adversary or on call of the court.

8. In cases brought originally in this court, briefs shall be filed on both sides at or before the argument, unless otherwise ordered by the court.

9. Whenever an extension of time for the filing of a brief is obtained, otherwise than pursuant to a stipulation of the respective parties, a copy of the order granting the extension shall forthwith be served by the party obtaining the same upon the opposite party.

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Where the account upon which an action is based consists of a single claim or contract which is certain and fixed in all its terms it cannot be said to be an open account. *Associated Repair Works v. Rogers*, '92.

2. *Application of statute relating to actions on open accounts.*

Whether an account upon which an action in a district court is founded is an "open account" within the meaning of Act 52, Session Laws of 1905, is to be determined primarily from an examination of the plaintiff's complaint, and if the complaint is so framed as to permit of the proof of other than an open account the statute will be held not to apply. *Associated Repair Works v. Rogers*, '92.

See DISMISSAL AND NONSUIT, 3; HUSBAND AND WIFE, 1.

ACCOUNTING.

See PARTITION, 1.

ACTION.

1. *Splitting cause—waiver.*

Plaintiffs sued in the district court for a portion only of an account claimed to be due; the case was dismissed on a technical motion without an adjudication upon its merits: Held, under the circumstances not to be a waiver of the portion of the account omitted. *Schoening & Co. v. Miner*, 196.

2. *Dismissal without trial—effect of.*

A dismissal of an action for want of jurisdiction or on technical grounds, without a trial upon the merits, does not constitute an adjudication. *Schoening & Co. v. Miner*, 22 Haw. 196.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS; APPEAL AND ERROR, 27

ADMISSIONS.

See EVIDENCE, 3, 5; QUIETING TITLE 1.

ADVERSE CLAIMS.

See QUIETING TITLE, 2.

ADVERSE POSSESSION.

1. *Declarations of person in possession—res gestae.*

ADVERSE POSSESSION—Continued.

In an action of ejectment, the defense being adverse possession, the declarations of the party in possession of the land as to the nature of his claim are admissible as part of the *res gestae* and as tending to prove hostility of claim, but statements as to the source of claim or manner of acquiring the possession, being narrations of past transactions, are not so admissible. *O. R. & L. Co. v. Kaili*, 673.

2. *Declarations made after expiration of statutory period of limitation.*

It is no objection to evidence of declarations admissible as part of the *res gestae* that they were not shown to have been made before the expiration of the statutory period of limitation. *O. R. & L. Co. v. Kaili*, 673.

3. *Evidence sustaining burden of proof of hostility of claim.*

Where one is shown to have been for the statutory period in actual, open, notorious, continuous and exclusive possession of land, apparently as owner, and such possession is unexplained, the presumption is that such possession was hostile. *O. R. & L. Co. v. Kaili*, 673.

4. *Acceptance of lease by party claiming title by adverse possession from disseizee.*

The rule is that while a recognition of title of the true owner by the one who has acquired title to land by adverse possession upon the completion of the statutory period will not alone defeat the title so acquired, such recognition is evidence to be considered in determining whether the prior possession of the adverse claimant was in fact adverse. *O. R. & L. Co. v. Kaili*, 673.

5. *Continuity of possession—recognition of superior title.*

Interruption of the continuity of possession occurs when the adverse claimant recognizes the title of the true owner. *O. R. & L. Co. v. Kaili*, 673.

6. *Payment of taxes as evidence.*

Payment of taxes may be shown in support of a claim of title to land by adverse possession. *O. R. & L. Co. v. Kaili*, 673.

AGENCY.

See PRINCIPAL AND AGENT.

ALIENATION, RIGHT OF.

See Trusts, 5.

ALTERATION OF INSTRUMENTS.

1. *Evidence—presumptions.*

Where a deed, the original draft of which appears to have been altered by interlineations, is introduced in evidence and some circumstances connected with the deed tend to show that the interlineations were made before execution, while others tend to

ALTERATION OF INSTRUMENTS—Continued.

show that they were made after execution, no presumption as to whether the alterations were made before or after execution should be indulged, but the court should find, as a fact, whether the alterations were made before or after execution of the deed. *Okamura v. Kaulani*, 414.

2. *Presumption as to date.*

Where in a deed which is relied on by a party to a suit, alterations are apparent, and there is no evidence to show when such alterations are made, the presumption of law is that they were made before its execution. *Okamura v. Kaulani*, 22 Haw. 414. See APPEAL AND ERROR, 10.

AMBIGUITY.

See WILLS, 6, 7.

AMENDATORY ACT.

See STATUTES, 9, 10.

AMENDMENT.

See EQUITY, 6, 7; PLEADING, 4;
PRINCIPAL AND SURETY, 6; QUO WARRANTO, 3;
STATUTES, 5.

APPEAL AND ERROR.

1. *Appeals from orders of circuit judges in probate—parties.*

The sureties on the bond of an executrix who were not parties to a proceeding in probate on the settlement of the accounts of the executrix in which an order was made surcharging her with a certain sum of money cannot appeal from such order under R. L. Sec. 1859. *Robinson v. Kaae*, 403.

2. *Bill for instructions—appeal by trustee.*

Where upon a bill for instructions brought by a trustee a decree was entered instructing and directing the trustee to pay to certain persons a portion of an annuity from and after a certain date in the past and it appeared that for a period after that date the trustee had paid the entire annuity to other persons from whom the trustee would have to recover the amount overpaid or make it good; held, that the trustee had such an interest in the decree as would entitle it to appeal therefrom to the supreme court. *Hawaiian Trust Co. v. Galbraith*, 78.

3. *Costs—security for.*

A writ of error does not lie to an order of a circuit judge at chambers requiring security for costs in a term case then pending in the circuit court and staying proceedings in the principal action pending a compliance with such order. *Davis & Co. v. Illinois-Pacific Glass Co.*, 303.

4. *Decree—Questions not raised in lower court.*

APPEAL AND ERROR—Continued.

While an appeal from a final decree in equity brings up the whole case for review, a proper decree granting appropriate relief need not be modified merely because it has not expressly covered matters incidental to the main issues as to which no question was raised in the lower court. *McBryde Sugar Co. v. Andrade*, 578.

5. *Evidence to support findings.*

A finding by the trial court that certain goods had been sold to and upon the credit of a partnership, which was based upon the direct testimony of a witness to that effect, ought not to be set aside as being against the evidence merely because it appeared that the account had been kept on the plaintiff's books in the individual name of one partner and the goods were billed and shipped in that name. *Hackfeld & Co. v. Yamamoto*, 455.

6. *Exceptions.*

An exception in the following language, "That thereafter and on to wit: the 14th day of October, 1914, a decision was filed in the above entitled cause by the judge, and to the filing of which decision, the defendant duly excepted and the exception was allowed," brings to the attention of this court no specific question of law presented to the trial court, and is too general to be considered in the appellate court. *Ripley & Davis v. Kapiolani Estate*, 507.

7. *Exceptions—writ of error—waiver.*

The defendant, against whom a judgment in a jury waived case was entered, appealed on exceptions and attacked the judgment on the ground that it was "contrary to law, the evidence and weight of evidence;" The exceptions were overruled; the defendant then sued out a writ of error attacking the judgment as contrary to law on the ground that the trial court failed to render its decision in writing stating the reasons therefor as required by Act 117, Laws 1909. Held, that the defendant is precluded by the decision upon his exceptions from making the objection upon writ of error, and by failure to make such objection on his former appeal waived the same. *Schoening & Co. v. Miner*, 353.

8. *Decision in jury waived case—mandatory statute.*

While the statute requiring the trial court in a jury waived case to render its decision in writing giving the reasons therefor is mandatory, a failure to render such decision, while reversible error, does not make the judgment void. *Schoening & Co. v. Miner*, 353.

9. *Execution—venditioni exponas.*

The regularity of the issuance of writs of execution and *venditioni exponas* by the clerk, and a sale thereunder by the sheriff, cannot be reviewed on writ of error. *Schoening & Co. v. Miner*, 353.

10. *Failure to find material fact—new trial.*

APPEAL AND ERROR—Continued.

Plaintiff, in an action to quiet title, relied upon a deed to her ancestor in which his initials had been inserted by interlineation; some circumstances impressed upon the face of the deed tended to show that the interlineations were made before execution, while others tended to show that they were made after execution, but there was no direct evidence to show when they were made; the trial court failed to find whether the interlineations were made before or after execution of the deed, but gave judgment for defendants: Held, that the time of making the interlineations was a material fact and the failure to find when they were made was reversible error for which plaintiff's exception to the decision on the ground that it was contrary to law and the evidence must be sustained, and a new trial granted. *Okamura v. Kaulani*, 414.

11. *Final and interlocutory decrees.*

An order made in an injunction suit assessing damages on an injunction bond against a surety thereon, directing that if the complainant does not pay such damages to the defendants to whom awarded, or to the attorneys of such defendants, within ten days, then a judgment to be entered in favor of the defendants against such surety, is an interlocutory order, and not a final decree, hence not appealable, although the order directs the surety to pay the sum awarded into court. *Honolulu Athletic Park, Ltd., v. Lowry*, 733.

12. *Final judgment.*

For the purposes of appeal an order, judgment or decree which finally determines the rights of the parties as to the controversy, or some material portion thereof, and provides the means for carrying the order, judgment or decree into effect, is final and appealable. *Honolulu Athletic Park, Ltd., v. Lowry*, 733.

13. *Interlocutory order or decree.*

An order, judgment or decree is not final, but interlocutory, when further action by the court is necessary to determine the final rights of the parties as to the matters affected by such order, judgment or decree, and from such order, judgment or decree an appeal does not lie as matter of right, but only by allowance of the circuit judge hearing the cause. *Honolulu Athletic Park, Ltd., v. Lowry*, 733.

14. *Final order or decree—order directing payment of money.*

An order or decree directing the payment of money, other than the payment into court for further disposition, is final in its nature and appealable. *Scott v. Stuart*, 641.

15. *Generality of reserved question.*

A question reserved to the supreme court should point to some rule of law the application of which, under the issues of law or

APPEAL AND ERROR—Continued.

fact, is, in the opinion of the trial court or judge, doubtful. *In re Sherwood*, 385.

16. *Inadmissible evidence—harmless error.*

Where secondary evidence is improperly admitted, and there is other evidence proving the fact sought to be established by such inadmissible evidence, an exception thereto will not be sustained, the error being harmless. *Ripley & Davis v. Kapiolani Estate*, 86.

17. *Pleading and practice—verdict.*

Where the complaint contains two counts, one seeking to recover for services upon a special contract, the other upon a *quantum meruit*, and it is apparent from the record, especially from the instructions, that the jury found, without evidence to support the verdict, upon the first count, the verdict will be set aside, although the jury might have found for plaintiff under the second count, especially, as in this case, when unauthorized interest is included in the verdict. *Ripley & Davis v. Kapiolani Estate*, 86.

18. *Instructions—record on exceptions.*

The general rule applied, that on exceptions to instructions given or requests therefor refused, the charge given to the jury should be in the record. *Holstein v. Benedict*, 441.

19. *Interrupting the examination of witness.*

A party has no inherent right to complete an examination or cross-examination of a witness without interruption by the court; it often happens that the court should interfere with such examination or cross-examination in order to protect the witness against improper treatment and for the proper administration of law. *Territory v. McGregor*, 786.

20. *Jury waived case—erroneous admission of evidence.*

Reversible error appears where it is shown that the decision of the circuit court in a jury waived case was based partly upon assumed facts of which there was no evidence or which were attempted to be shown only by evidence improperly admitted over objection, and the evidence on the main issue was conflicting. *O. R. & L. Co. v. Kaili*, 673.

21. *Exceptions in jury waived case.*

Exceptions, in a jury waived case, to an oral decision of the court, and to the overruling of a motion for a new trial which was made before the written decision was filed, present nothing for the consideration of the appellate court. *O. R. & L. Co. v. Kaili*, 673.

22. *Same—validity of writ of possession.*

Where the defendant in error moves to dismiss the writ of error on the ground that a writ of possession issued on the judgment was fully satisfied before the writ of error issued, he must show that the writ of possession issued by authority of law; a writ which issued during the pendency of an appeal from the judg-

APPEAL AND ERROR—Continued.

ment, without notice to the judgment defendant and without opportunity to give a stay bond, was without authority of law, and will not support the motion to dismiss the writ of error, it appearing that the appeal was discontinued after the satisfaction of the writ of possession and prior to the issuance of the writ of error. *Ahult v. Lip Yan*, 708.

23. *Motion to dismiss writ—evidence.*

On motion to dismiss a writ of error on the ground that a writ of possession issued and was fully satisfied before the writ of error issued, the writ of possession and return thereon, and an affidavit *aliunde* showing that defendant had paid the costs, will not be stricken from the record on motion, the same being competent evidence for the purpose of the motion; but an affidavit of the officer executing the writ of possession, showing what he did, will be stricken from the record on motion, as the execution of the writ must be shown by the officer's return, which, if defective, may be cured by amendment in the court below, but not otherwise. *Ahult v. Lip Yan*, 708.

24. *Necessary parties.*

All the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal or it will be dismissed except sufficient cause for the nonjoinder be shown. *Robinson v. Kaae*, 397.

25. *Nonsuit—exemption.*

A judgment of nonsuit is properly entered in an action to recover a horse, wagon and harness levied upon under execution, and claimed to be exempt, where plaintiff fails to show that he is within one of the classes of persons protected by the statute. *Fugita v. Motoshige*, 136.

26. *Order appointing special administrator.*

An order made by a circuit judge appointing a special administrator is interlocutory and not appealable. *Estate of Luttet*, 712.

27. *Refusing oral request for instruction.*

The trial court properly refused to consider an oral request for an instruction made in open court before the jury; all requests for instructions are required to be in writing. *Territory v. McGregor*, 786.

28. *Instructions to jury.*

It is not error to refuse a request for a proper instruction when the question of law presented by the requested instruction is covered by another instruction given by the court to the jury. *Territory v. McGregor*, 786.

29. *Stating grounds of exception.*

It is not error for the court to refuse to permit counsel, who has excepted to an instruction given by the court of its own volition,

APPEAL AND ERROR—Continued.

to state the ground of his exception in the presence of the jury on the ground that in order to have the exception considered by the appellate court it was necessary to state the grounds of the exception, as under our practice a general exception to a specified instruction is sufficient. This is a matter within the discretion of the court, and while it would be proper to permit counsel to state the grounds of an exception, it would not be proper to permit counsel to incorporate in his exception argumentative matter as to the correctness or incorrectness of the instruction to which the exception is directed. *Territory v. McGregor*, 786.

30. *Reserved question—construction of statute.*

Under Sec. 2511 R. L. 1915, while the authority to reserve is discretionary with the trial court, the statute did not intend that questions should be reserved unless the judge below has well founded doubts upon them. *Territory v. Scully*, 484.

31. *Same—motion to dismiss.*

Where the identical question reserved has not been ruled upon by the trial court, and is one of great public importance which has never been ruled upon by this court, it will not be dismissed on motion although a question in all respects similar appears to have been ruled on by the trial court in the same case. *Territory v. Scully*, 484.

32. *Witness—unanswered question.*

An exception should not be predicated upon a question propounded to a witness and objected to, when for any reason the question is not answered, the adverse party not being prejudiced. *Ripley & Davis v. Kapiolani Estate*, 86.

33. *Practice under writ of error to circuit court in case appealed from district court.*

In a case where the defendant took a general appeal to the circuit court from a judgment rendered against him after a trial in a district court, and thereupon a judgment upon the pleadings was rendered against him in the circuit court which judgment is reversed by the supreme court upon a writ of error, judgment may not be entered in the supreme court in favor of the plaintiff in error on the evidence taken in the district court upon the ground of failure of proof. The case should be tried *de novo* in the circuit court. *Associated Repair Works v. Rogers*, 92.

34. *Writ of error—statutory construction.*

Under sections 1869, 1874, R. L., any one of the defendants against whom a joint judgment is rendered, feeling himself aggrieved thereby, has a legal right to prosecute a writ of error for his own benefit but it must be done in the names of all the parties jointly interested in the judgment below. *Robinson v. Kaae*, 397.

35. *Same—where some of defendants have filed bill of exceptions.*

APPEAL AND ERROR—Continued.

Where one or more of several defendants against whom a joint judgment is rendered bring the case to this court for review on a bill of exceptions this does not operate as a severance which will justify another of the defendants in separately suing out a writ of error without making his codefendants parties thereto. *Robinson v. Kaae*, 397.

36. *Same—appellate court—jurisdiction.*

The presence of all the necessary parties is essential to the jurisdiction of an appellate court and where the time has expired for suing out the writ the omitted parties cannot be brought in by an amendment. *Robinson v. Kaae*, 397.

37. *Writ of error—questions reviewable.*

Only errors of law apparent on the record are reviewable on error. Facts which do not appear in the record may not be brought to the attention of the supreme court by means of exhibits attached to briefs of counsel. *Holstein v. Benedict*, 441.

38. *Writ of error—abandonment of assignments.*

In a case submitted on briefs assignments not argued in the briefs will be considered to have been abandoned and will not be noticed. *Akana v. Territory*, 479.

39. *Wrong reason for correct judgment.*

It is a well established rule that a judgment, order or decree will be affirmed on appeal if the record shows it to be correct, although the trial court may have given a wrong reason for making it. *Consolidated Amusement Co. v. Hughes*, 550.

40. *Motion for rehearing, denied when.*

Where all the grounds set forth in a petition have been considered and found to be without merit, rehearing will be denied under rule 5 of the court. *Magoon et al. v. Lord-Young Engineering Co., Ltd.*, 390.

41. *Exceptions, definiteness.*

Exceptions must be sufficiently definite and specific to call to the attention of the appellate court a point of law which was called to the attention of the trial court affecting the legality of its ruling, thus giving the lower court the opportunity to correct its ruling if erroneous. *Ripley & Davis v. Kapiolani Estate*, 507.

42. *Evidence on appeal from district magistrate.*

On a general appeal to the circuit court from a judgment rendered by the district magistrate, the case comes up *de novo*, and the fact that the defendant, before the magistrate, may have permitted certain evidence to be received against him, without objection, would in no wise prevent him from objecting to the admission of such evidence, or raising a constitutional question as

APPEAL AND ERROR—Continued.

to its competency in the circuit court upon appeal. *Territory v. Hoo Koon*, 597.

See ASSUMPSIT, 1; COSTS, 1; DIVORCE, 2; EQUITY, 1, 2, 4; EXCEPTIONS, 1, 2; HEALTH, 4; INJUNCTION, 7; PROHIBITION, 4; TRIAL, 1; VERDICT, 1.

APPELLATE COURT.

See COURTS, 4.

ARRESTS.

See CRIMINAL LAW, 3.

ASSUMPSIT.

1. *Defense of payment—non-prejudicial error.*

Where in an action of assumpsit for money had and received the answer is a general denial unaccompanied by notice of defendant's intention to rely upon the defense of payment, and on the trial the defendant testifies that he received the money sued for, the admission in evidence of hearsay testimony tending to prove that defendant had not paid back such money is non-prejudicial error of which defendant will not be heard to complain. *Kapela v. Gilliland*, 655.

ATTACHMENT.

See GARNISHMENT, 2.

ATTACHMENT BOND.

See PRINCIPAL AND SURETY, 6.

ATTORNEY AND CLIENT.

1. *Disbarment—preliminary investigation—evidence.*

In a preliminary investigation to determine whether charges made against a practicing attorney should be prosecuted, *ex parte* affidavits are admissible, and an official report requested to determine the propriety of prosecuting such charges should not be stricken from the files for the reason that it was made upon evidence and *ex parte* statements made in the absence of the accused attorney who did not have the opportunity to confront and cross-examine the witnesses. *In re McCarn*, 111.

2. *Liability of attorney for costs.*

The attorney for the losing party in a case is not personally liable to the successful party for the amount of the costs which have been paid into court by that party. Rule 10 of the Supreme Court, which provides that "Attorneys shall be liable for costs incurred by their respective clients," was made for the protec-

ATTORNEY AND CLIENT—Continued.

tion of the court and gives rise to no obligation in favor of a party litigant as against the attorney for the opposite party. *Holstein v. Benedict*, 749.

See HUSBAND AND WIFE, 3.

BAIL AND RECOGNIZANCE.

1. *Cash deposit.*

An accused, lawfully arrested and charged with the commission of a criminal offense, who voluntarily deposits a sum of money in lieu of bail and thereby procures his discharge cannot, after the deposit has been forfeited and paid into the county treasury, recover the same back. *Palakiko v. County of Maui*, 759.

BALLOTS.

See PRIMARY ELECTIONS, 2.

BANKRUPTCY.

1. *Act of 1898—jurisdiction to determine debtor's claim for exemptions.*

The adjustment of the debtor's claim for exemptions is a matter which pertains to the administration of the bankrupt estate over which the court in which those proceedings are pending has exclusive jurisdiction. *Lee Lun v. Henry*, 165.

2. *Trover for property claimed as exempt.*

As a predicate to the right to maintain trover for the conversion of property claimed as exempt the bankrupt must first show that the property with respect to which he seeks to prosecute his action has been determined by the court in which he was adjudicated a bankrupt to be exempt property. *Lee Lun v. Henry*, 165.

3. *Exemptions—burden of proof.*

The burden of proving the exemption is on the party claiming it and his right thereto must be shown by conclusive proof. *Lee Lun v. Henry*, 165.

4. *Preferential transfer.*

A suit by a trustee in bankruptcy to set aside a transfer by a bankrupt as a voidable preference held not to be a suit to recover on the ground of fraud. *Easton v. Willfong*, 259.

5. *Same—insolvency—burden of proof.*

In a suit by a trustee in bankruptcy to set aside a transfer by a bankrupt as a voidable preference, the burden of proof is on the plaintiff to establish the insolvency of the bankrupt at the time of the transfer. *Easton v. Willfong*, 259.

6. *Books of bankrupt as evidence—individual debt of partner.*

The books of a bankrupt are evidence on the question of insolvency within four months of the date of filing the petition, but

BANKRUPTCY—Continued.

they are not conclusive, for they may be incomplete, incorrect or fraudulent. An individual debt of a member of the firm is none the less such because it is entered on the firm books, and while such entry may constitute a *prima facie* showing that the indebtedness therein referred to is a firm liability, such showing may be overcome by other satisfactory evidence. *Easton v. Willfong*, 259.

7. *Schedules of bankrupt as evidence.*

In a contest between a trustee in bankruptcy and one sought to be charged as a creditor having received an unlawful preference, the schedules of the bankrupt in the bankruptcy proceedings are admissible in evidence on the issue of insolvency. *Easton v. Willfong*, 259.

8. Evidence considered, and held that it is not satisfactorily shown in this case that the alleged preferred creditor had at the time of the transfer reasonable cause to believe that the transfer would result in a preference. *Easton v. Willfong*, 259.

BAWDY HOUSE.

See CRIMINAL LAW, 1.

BENEFICIAL ASSOCIATION.

1. *Scope of powers of.*

An incorporated beneficial association is limited to the purposes or object expressed in its charter and when the charter of the association prescribes who shall be the beneficiary of a membership after the death of the member it is not in the power of the company or the member or of both to alter the rights of those who by the charter are declared to be the beneficiaries except in the mode and to the extent therein indicated. *Camara v. Lusitana Society*, 370.

2. *By-law—when void.*

A by-law which is inconsistent with the charter is unauthorized and void. *Camara v. Lusitana Society*, 370.

3. *Same—beneficiary of mortuary fund.*

Where the charter expressly provides who shall be entitled to receive the mortuary fund after the death of a member the corporation cannot make a by-law extending or limiting the right thus regulated. *Camara v. Lusitana Society*, 370.

4. *Same.*

The designation of a person not entitled to take under the charter of the society does not invalidate the contract but only the designation so that the benefit will go to the person rightfully entitled to take under the charter of the society. *Camara v. Lusitana Society*, 370.

BENEVOLENT SOCIETY.

See CORPORATIONS, 2.

BEQUESTS.

See WILLS.

BEST EVIDENCE RULE.

See EVIDENCE, 14.

BILLS AND NOTES.

1. *Statute of limitations—payment by co-maker.*

The payment of interest by one or two joint and several makers of a promissory note within the period of limitation will start the statute of limitations to run afresh as to the other, as well as the one who made the payment, though the payment was made without the knowledge or authorization of the other. *Macaulay v. Schurmann*, 140.

BILL FOR INSTRUCTIONS.

See APPEAL AND ERROR, 2; TRUSTS, 1.

BONDS.

1. *Words and phrases—"lawful orders."*

The phrase "lawful orders" in the condition of a probate bond that the principal shall "obey all lawful orders and directions of this court" does not mean orders free from error. An order made by a court having jurisdiction to make it is a lawful order though it be erroneous. *Robinson v. Kaae*, 403.

See OFFICERS, 2; PRINCIPAL AND SURETY, 1, 2, 3, 4, 6.

BURDEN OF PROOF.

See BANKRUPTCY, 3, 5; DIVORCE, 6; FRAUD, 1; LANDLORD AND TENANT 7.

BY-LAWS.

See BENEFICIAL ASSOCIATIONS, 2, 3; CORPORATIONS, 2.

CANCELLATION OF INSTRUMENTS.

See EQUITY, 3; FRAUD, 1.

CANDIDATES.

See PRIMARY ELECTIONS, 1, 2; STATUTES, 7.

CERTAINTY OF NOTICE.

See HEALTH, 3.

CERTIFICATION, OF COPY OF PROCESS.

See GARNISHMENT, 6.

CHARTERS.

See BENEFICIAL ASSOCIATIONS, 1, 2, 3.

CIRCUIT JUDGE.

See COURTS, 5.

CIRCUIT JUDGE AT CHAMBERS.

See COURTS, 3; MANDAMUS, 4.

CIVIL SERVICE COMMISSION.

See MUNICIPAL CORPORATIONS, 1, 2, 3; OFFICERS, 1.

CLERKS OF COURTS.

1. *Tenure of office.*

A clerk of the circuit court holds his office during the pleasure of the appointing power. *In re Pringle*, 557.

2. *Appointment and removal—Sec. 2314 R. L. 1915 construed.*

Under section 2314 R. L. 1915, which provides that there shall be as many clerks of the circuit courts as may be necessary, appointed and removable by the judge or judges thereof, as the case may be, held, that in a circuit where there are more judges than one, the appointment or removal of a clerk requires the presence, actual or constructive, of all the judges and the concurrent action of a majority. *In re Pringle*, 557.

3. *Right of de facto officer to compensation.*

The salary of an office follows the title and when an individual claims by action the office, or the incidents to the office, he can only recover upon proof of title. *In re Pringle*, 557.

4. *Same—title to the office in issue.*

An officer seeking to compel payment of compensation by mandamus must show that he is an officer *de jure* and not merely an officer *de facto*. In such a proceeding his title to the office may be put in issue. *In re Pringle*, 557.

COLOR OF AUTHORITY.

See EMBEZZLEMENT, 3.

COMMITTEES.

See COUNTIES, 1, 2.

COMMON LAW.

See DESCENT AND DISTRIBUTION, 1.

COMPENSATION.

See SALARIES AND COMPENSATION.

COMPETITIVE EXAMINATIONS.

See MUNICIPAL CORPORATIONS, 1, 3.

CONFIDENTIAL RELATIONS.

See PRINCIPAL AND AGENT, 2.

CONFLICTING DEVISES.

See WILLS, 1, 2, 3.

CONFLICTING EVIDENCE.

See DIVORCE, 2; EQUITY, 2.

CONSTITUTIONAL LAW.

1. *Taxation.*

Act 99, Session Laws of 1913, was enacted by the legislature of the Territory in the exercise of the power of taxation, and so far as the petitioner in this case has questioned its validity it is held to be not unconstitutional. *In re Kalana*, 96.

2. *Licenses, payment in full of all taxes as condition precedent to issuing.*

That portion of Act 99, Session Laws of 1913, which act amends section 1323 of the Revised Laws, as amended, providing "that no license shall be so issued until the applicant therefor shall have filed with the treasurer of the county or city and county a certificate showing the payment in full of all taxes due from said applicant on the date of said application," does not impose any penalty for the past delinquency nor attempt to punish the applicant for any past offense, hence the same is not invalid as being in conflict with the provision of the Federal Constitution prohibiting the passage of *ex post facto* laws. *In re Kalana*, 96.

3. *Statutes—title.*

Section 45 of the Organic Act which provides "That each law shall embrace but one subject, which shall be expressed in its title," has the force and effect of a constitutional provision which is mandatory. *Territory v. Kua*, 307.

4. *Police power—right to trial by jury—due process of law.*

The validity of Chapter 83 of the Revised Laws, relating to the improvement of lands which are in an insanitary or dangerous condition, and deleterious to the public health, as determined in *Brown v. Campbell*, 21 Haw. 314, reaffirmed. *Magoon v. Lord-Young Engineering Co.*, 321.

5. *Indeterminate sentence statute.*

Section 3843 R. L. 1915, does not impinge upon the power and discretion vested in the court by section 81 of the Organic Act, is within the legislative power, and is not unconstitutional. *Territory v. Armstrong*, 526.

6. *Search and seizure.*

Where the police, without a warrant, arrest a person for having

CONSTITUTIONAL LAW—Continued.

opium unlawfully in his possession, they may search the person of the one so arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which such person is arrested. *Territory v. Hoo Koon*, 597.

7. *Same—articles unlawfully in possession of person arrested.*

Where a person is lawfully arrested in his room for having opium in his possession and the police, in making such arrest, without a search warrant search the room of the offender and seize certain opium and opium pipes found therein, the same should be treated as tools used for the perpetration or attempted perpetration of crime and may be held to be used in evidence (if otherwise admissible) to prove the charge on which such person is arrested; and such search and seizure is not in violation of the rights of the defendant under the Fourth Amendment to the Constitution of the United States. *Territory v. Hoo Koon*, 597.

8. *Inheritance tax.*

The statute imposing an inheritance or succession tax upon a transfer under a power of appointment made in contemplation of death, whether the power of appointment was created before or after the enactment of the statute, is valid and constitutional. *Robinson v. Treasurer*, 742.

CONSTRUCTION OF DEEDS.

See DEEDS, 3.

CONSTRUCTIVE NOTICE.

See GARNISHMENT, 3, 4.

CONTEMPT.

1. *Procedure in cases of constructive contempt—formal complaint.*

In cases of constructive contempt where the facts constituting the alleged offense do not appear of record and are not evident to the court it is necessary to give the court jurisdiction to proceed against the contemnor that a formal affidavit, complaint or information stating the facts be filed as a basis upon which an order to show cause or attachment may issue. *Rose v. Ashford*, 469.

2. *Failure of officer to serve process as.*

Under the Statutes of this Territory it is a misdemeanor for an officer to wilfully and corruptly refuse, neglect or delay the serving of lawful process for the apprehension of any person charged with an offense whereby such person shall avoid arrest and go at large, and the wilful disobedience or neglect of any lawful process or order is contempt of court. *Rose v. Ashford*, 469.

CONTEMPT PROCEEDINGS.

See PROHIBITION, 2.

CONTINGENT INTERESTS.

See TRUSTS, 4.

CONTINUITY OF POSSESSION.

See ADVERSE POSSESSION, 5.

CONTRACTS.

1. *Maintenance and services—members of family.*

Where maintenance and services are rendered between relatives living together as one household there is a presumption that they were intended to be gratuitous. In order to recover therefor the plaintiff must overcome this presumption by proving affirmatively either an express contract for remuneration or circumstances showing a mutual understanding or expectation between the parties that there would be compensation. *Holstein v. Benedict*, 441.

2. *Express—implied—evidence.*

The only distinction between an express contract and an implied contract lies in the mode of proof; there is none in the nature of the understanding. The one is to be proven by direct evidence of its terms, while the other is to be shown by indirect evidence, being an implication reasonably drawn from all the circumstances and relations of the parties. *Wall v. Focke*, 221.

See CORPORATIONS, 6.

CONTRACTS FOR PERSONAL SERVICES.

See INJUNCTION, 6.

CONTRACTOR'S BOND.

See PRINCIPAL AND SURETY, 2, 3, 4.

CONTRIBUTION.

See PRINCIPAL AND SURETY, 7.

CONTRIBUTORY NEGLIGENCE.

See DAMAGES, 1.

CONVEYANCES.

1. *Setting aside—undue influence and mental incapacity.*

Undue influence on the part of one party to a transaction, and mental incapacity on the part of another are inconsistent grounds for relief, inasmuch as a claim that the one party acted under the domination of the other presupposes the requisite legal capacity in the one. *Sumner v. Jones*, 391.

See PRINCIPAL AND AGENT, 1.

COPY OF PROCESS.

See GARNISHMENT, 6.

CORPORATIONS.

1. *Agency—evidence.*

CORPORATIONS—Continued.

Agency, on behalf of one acting for a corporation may be established by proof of facts, and by circumstances; and, evidence showing that one asserted to be an agent for a corporation has attended to its ordinary business prior and up to the time of the act or acts involved, and performed other and similar acts for the corporation, is admissible as tending to show the relation of principal and agent between the corporation and such person. *Ripley & Davis v. Kapiolani Estate*, 86.

2. Elections—right to vote.

Where, under the by-laws of an incorporated benevolent society, all members in good standing were entitled to vote at an annual meeting for the election of trustees, a requirement sought to be imposed by the board of trustees whereby members who could not produce a certificate of membership, or whose names did not appear upon an admittedly incomplete roll book, were required to pay the sum of two dollars in order to vote at such annual election, is illegal, and trustees elected at a meeting where such requirement was enforced and members of the society in good standing were prevented from participating, held not to have been legally elected. Where, thereafter, and on the same day, the members so excluded forced their way into the meeting place and proceeded in an orderly manner to hold a meeting and elect trustees, held that the trustees so elected became the duly elected trustees of the society. *Yong Kwong Tat, et al., v. Yee Mun Wai, et al.*, 604.

3. Meetings—presence of persons not members.

An election held at a meeting of an incorporated society is not invalid by reason of the presence at the meeting of persons not members, unless it be shown that they voted and that their votes were sufficient to have affected the result. *Yong Kwong Tat, et al., v. Yee Mun Wai, et al.*, 604.

4. Partnership—implied power.

A corporation has no implied power to form a copartnership with individuals. *Dong You v. Wing Hing Co.*, 660.

5. Authority to form copartnership.

Section 3388, R. L. 1915, which authorizes two or more corporations to enter into partnership with each other does not authorize a corporation to form a copartnership with an individual. *Dong You v. Wing Hing Co.*, 660.

6. Liability for value of benefits received under ultra vires contract—remedy of other party to such contract.

Where money has been paid or property transferred to a corporation under a contract *ultra vires* but not *malum in se* or otherwise immoral, and the other party has not received the consideration for it, an action of assumpsit, or other appropriate action

CORPORATIONS—Continued.

not based on the unlawful contract, may be maintained for its recovery. *Dong You v. Wing Hing Co.*, 660.

CORPORATIONS.

See EMBEZZLEMENT, 8.

CORPUS DELICTI.

See EMBEZZLEMENT, 10.

COSTS.

1. *On appeal—irrespective of final judgment.*

The party who prevails upon a writ of error is entitled to the costs of the appeal even though final judgment in the original action is against him. *Hapai v. Brown*, 20.

See APPEAL AND ERROR, 3; ATTORNEY AND CLIENT, 2.

CO-TENANCY.

See JUDGMENT, 4.

COUNTIES.

1. *Board of supervisors—committee.*

The power of a county to do ordinary business, and to buy and sell property, is vested in its board of supervisors which may, through one of its members, acting as a committee, sell property, and supervise road work in a given district. *County of Hawaii v. Purdy*, 272.

2. *Presumption from an agreed custom.*

It having been stipulated by the parties that P, a member of the board of supervisors for the district of H, sold certain crushed rock; supervised the road work in his district; made up false pay-rolls for road work; approved same and presented them to the board of supervisors which allowed same, after which he received and cashed warrants for the fraudulent claims, and converted money from such sales and fraudulent claims; and, that he acted under a custom existing in the county under which a supervisor made such sales, supervised road work in his district and looked after the pay-rolls, the law presumes, in the absence of any showing to the contrary, that the board of supervisors had authorized him, as a committee of the board, to make such sales, and supervise such road work, and look after the pay-rolls therefor; and that he was acting in a matter in which he was authorized to act. *County of Hawaii v. Purdy*, 272.

3. *Negligence of employees—demurrer.*

A demurrer to a complaint alleging facts showing an injury to private property resulting directly from the negligence of road employees of a county acting within the scope of their employment is properly overruled. Following decisions in *Matsumura*

COUNTIES—Continued.

v. County of Hawaii, 19 Haw. 18 and 496. *Halawa Plantation v. County of Hawaii*, 753.

See EMBEZZLEMENT, 1, 2, 3, 4.

COURTS.

1. *Jurisdiction of district courts.*

District courts are courts of limited jurisdiction and can only act within the authority vested in them by law. *Harrison v. McCandless*, 129.

2. *Stare decisis—law of the case.*

The doctrine of the law of the case does not apply to facts found by a trial court so as to preclude it, upon a second trial of a case, from finding the facts differently though the evidence be substantially the same. *Wall v. Focke*, 221.

3. *Circuit judge at chambers—jurisdiction—garnishment.*

The expression "circuit judge (or court) at chambers" has two meanings in the statutes of this Territory. It may refer either to the independent jurisdiction exercised at chambers pursuant to R. L. Sec. 1648, or to the incidental jurisdiction exercised at chambers in connection with or ancillary to an action at law. A proceeding for the attachment of a debt due a judgment debtor pursuant to R. L. Secs. 2117, 2118, may be had in exercise of the jurisdiction of the latter kind. *Volcano Stables & Transportation Co. v. Ferry*, 229.

4. *Supreme court—appellate court.*

The supreme court of this Territory is primarily a court of appeal and has such original jurisdiction only as has been expressly, or by necessary implication, conferred upon it by law. *In re Pringle*, 589.

5. *Disqualification of judge—pecuniary interest.*

A circuit judge is not disqualified to hear or determine a partition suit by reason of a pecuniary interest therein because of his having made an order directing the payment of an attorney's fee for services rendered for the judge in a prohibition proceeding growing out of the partition suit, out of a fund in court belonging to the parties to the suit, such order having no connection with the subject-matter or issues of that suit. *Scott v. Stuart*, 641.

See JUDGES, 1; MANDAMUS, 4.

COVENANTS.

See LANDLORD AND TENANT, 6.

CRIMINAL ACTS, RESTRAINT OF.

See EQUITY, 11.

CRIMINAL LAW.

1. *Keeping house of ill fame.*

Under section 3162, Revised Laws, the term "house of ill fame" is no doubt a synonym for "bawdy house," having no reference to the fame of a place but denoting a fact. The gist of the offense is the keeping and use of the house for purposes of prostitution and lewdness and not its reputation. The statute does not require that the place be used habitually or for any considerable length of time for the prohibited purposes in order to constitute the offense in question. *Territory v. Peter*, 132.

2. *Vulgar language.*

Language used in a public place is vulgar, within the meaning of section 3188 R. L., which offends a sense of modesty and decency, and is calculated to cause a breach of the peace. *Territory v. Kaaikaula*, 204.

3. *Arrests.*

Under section 3726 R. L. 1915 the right of the police to arrest without a warrant is not limited to felonies, and under section 3731 R. L. 1915 the officer may, if he has reasonable cause to believe that an offense has been or is being committed, enter a house to arrest an offender. *Territory v. Hoo Koon*, 597.

4. *Jurisdiction—district magistrate—jury trial.*

A defendant was charged before a district magistrate with the offense of selling liquor without a license, appeared and demanded a trial by jury; the district magistrate granted the demand; the prosecution refused to introduce any evidence; the defendant moved for her discharge, which motion was denied, and she was committed to answer to the circuit court: Held, the district magistrate had no jurisdiction to commit the defendant for trial to the circuit court in the absence of evidence tending to show the commission of the offense and the probability of defendant's guilt, and that defendant was entitled to her discharge. *Territory v. Nishimura*, 614.

5. *Indecent assault—proof defense.*

Under an indictment for indecent assault it is not necessary for the prosecution to prove that the offense was committed without the intent to commit rape. Nor is it a defense to such charge that the evidence shows that the defendant did intend to commit rape. *Territory v. Tan Yick*, 773.

6. *Heedless driving—instruction to jury.*

It is proper to instruct the jury that in determining whether the defendant was guilty of heedless driving as charged they should take into consideration the time and place of the offense charged as to light or darkness; the presence or absence of other vehicles on the highway at the time; the width of the highway; the condition of the vehicle driven by defendant as to equipment; the defendant's manner of driving; and, all of the surrounding cir-

CRIMINAL LAW—Continued.

cumstances as shown by the evidence. *Territory v. McGregor*, 786.

7. *Sentence.*

Where a sentence is erroneous in that it does not fix the minimum term of imprisonment of the defendant, yet if the proceedings were regular and free from prejudicial error, the verdict authorized by the evidence, and the defendant had a fair trial, the error in the sentence may be corrected. *Territory v. Armstrong*, 526.

CROSS-LIBEL.

See DIVORCE, 3.

DAMAGES.

1. *Contributory negligence.*

In an action for damages on account of injury to a growing crop of cane caused by a fire negligently started by defendant's servants on a highway near the plaintiff's cane-fields the fact that the plaintiff, who had no notice that the fire was to be started, had permitted dead grass and dry leaves to remain on the space between such highway and cane-fields would not permit a finding by the jury of contributory negligence on the part of the plaintiff. The requested instruction submitting the question of contributory negligence was properly refused. *Halawa Plantation v. County of Hawaii*, 753.

See VERDICT, 1.

DECREE.

See APPEAL AND ERROR, 4.

DEEDS.

1. *Validity—mental capacity.*

Where advantage has been taken of a person of weak or impaired mind to consummate with him an unconscionable bargain, equity will set it aside. *Sumner v. Jones*, 23.

2. *Forged deed void.*

A forged deed is void and passes no title. The fact of forgery may be shown at law as well as in equity. *Palau v. Helemano Land Co.*, 357.

3. *Construction.*

A deed purporting to convey all the right, title and interest of the grantor in and to the estate of his deceased father will pass his title to the property derived by him out of the estate of his father who died testate though the grantor erroneously described himself as an "heir at law." *Magoon v. Kapiolani Estate*, 510.

4. *Instrument testamentary in character—reservation of life estate.*

A deed of land containing operative words of present grant is

DEEDS—Continued.

not inoperative as being testamentary in character because of the reservation therein of life estates to the grantors nor because it contains a recital that the land should, upon the death of the grantors, go to the grantees "share and share alike." *Magoon v. Lord-Young Engineering Co.*, 327.

DEEDS.

See ALTERATION OF INSTRUMENTS, 1; FRAUD, 1.

DE FACTO OFFICERS.

See CLERKS OF COURTS, 3, 4.

DEFAULT.

See JUDGMENT, 1; LIMITATION OF ACTIONS, 2.

DEFECTIVE APPLIANCE.

See MASTER AND SERVANT, 1, 2, 4.

DELAY, IN BRINGING SUIT.

See INJUNCTION, 2, 3.

DEMURRER.

See COUNTIES, 3; EMBEZZLEMENT, 6; INDICTMENT AND INFORMATION, 2; MANDAMUS, 1; PLEADING, 4; QUO WARRANTO, 1, 3.

DESCENT AND DISTRIBUTION.

1. *Construction of statute—common law.*

Where a statute of descent purports to furnish a full and complete scheme for the distribution of intestate property the rules of descent of the common law are excluded. *Hawaiian Trust Co. v. Galbraith*, 78.

2. *Application of statute to given case.*

Under R. L. Sec. 2509, where the intestate is a woman who leaves neither issue nor husband nor parent, but does leave a brother, children of a deceased brother, and children of a deceased niece, the estate is to be divided between such collaterals, the children of the deceased niece taking the share which their mother would have taken had she been living. *Hawaiian Trust Co. v. Galbraith*, 78.

DESERTION.

See DIVORCE, 1.

DEVISES.

See WILLS.

DILATORY MOTION.

See DISMISSAL AND NONSUIT, 1.

DISBARMENT.

See ATTORNEY AND CLIENT, 1.

DISCRETION OF COURT, OR JUDGE.

See APPEAL AND ERROR, 30, 31; EQUITY, 6.

DISMISSAL AND NONSUIT.

1. *Dilatory motion.*

A motion for nonsuit made after the defendant has introduced evidence in support of his defense comes too late and should be denied on that ground. *Halawa Plantation v. County of Hawaii*, 753.

2. *Motion to dismiss as to part only.*

A motion to dismiss an action upon account, as to some items thereof, on the ground that plaintiff had waived same, is properly denied. *Schoening & Co. v. Miner*, 196.

3. *Proof as to part of cause of action.*

A motion for nonsuit in an action upon account is properly denied where the evidence tends to prove some of the items of the account. *Schoening & Co. v. Miner*, 196.

See ACTION, 2; DIVORCE, 7; EQUITY, 3; JUDGMENT, 2, 3; LIMITATION OF ACTIONS, 1.

DISQUALIFICATION OF JUDGE.

See COURTS, 5; JUDGES, 1; MANDAMUS, 3.

DISTRICT COURT, OR MAGISTRATE.

See COURTS, 1; CRIMINAL LAW, 4; LANDLORD AND TENANT, 1.

DIVORCE.

1. *Desertion.*

Where a husband sues his wife for a divorce on the ground of desertion and it appears from the evidence that such desertion was wilful and utter for a period of more than one year, held, that the bringing of another woman to this Territory and the mere claiming by the husband of such other woman as his wife, subsequent to the desertion, unaccompanied by proof of any illicit or improper relations with such woman, is not sufficient ground for refusing a decree to the deserted husband. *Nishihara v. Nishihara*, 189.

2. *Review of facts on appeal—conflicting evidence.*

In cases turning wholly or largely upon the credibility of witnesses and the weight of testimony much weight is accorded to the findings of the trial judge who saw the witnesses and heard them testify, the general rule being that a decree granting or refusing a divorce on evidence which is conflicting will not be disturbed. *Nishihara v. Nishihara*, 189.

3. *Cross-libel for separation—affirmative relief.*

DIVORCE—Continued.

Under Act 121, Laws of 1913, which provides that a cross-libel may be filed in any action for divorce and affirmative relief granted thereon as fully and effectually as in original petitions for divorce, a cross-libel may be filed by the libellee in a divorce action praying for a separation from libellant and in a proper case the relief prayed may be awarded to the libellee upon such cross-libel. *Makahio v. Makahio*, 425.

4. *Public hearing.*

Under Sec. 2229, Revised Laws, providing that no divorce case shall be heard except openly in the public court-rooms, while it may in certain cases be proper to exclude from the court-room persons of immature years, the circuit judge has no power to hear a case except openly in the public court-room and the taking of testimony by the judge in his private chambers behind closed doors is error for which the case must be reversed. *Makahio v. Makahio*, 425.

5. *Separate grounds for, separate causes of action.*

Separate statutory grounds for divorce constitute separate causes of action, and a libellant is not bound to allege or disclose every known existing ground for divorce in one suit under penalty of being foreclosed thereafter from setting up any ground not so alleged or disclosed. *Macedo v. Macedo*, 429.

6. *Res judicata—burden of proof.*

Where the ground for divorce set up in a second suit is the same as that which was alleged in a former suit between parties, though based on different facts, but no new facts occurring subsequent to the first case are averred, the former decree is conclusive unless it be shown that the party was ignorant of the existence of the facts at the time of the first trial. But if new grounds for divorce are set up in the second suit the decree in the former suit will not operate as a bar except as to such matters as were therein actually decided, and where the record in the former suit does not disclose upon what ground the decree rested the burden is upon the party asserting the estoppel to prove that the fact or matter relied on was litigated and determined in that suit. *Macedo v. Macedo*, 429.

7. *Decree dismissing libel for divorce—ground of dismissal uncertain.*

In a case where it is uncertain upon which of several grounds of defense a decree dismissing a libel for divorce rested, the decree, notwithstanding the uncertainty, will operate as an estoppel in a subsequent suit brought by the libellant on the same facts, where it is immaterial upon which ground the former decree was based. *Macedo v. Macedo*, 429.

8. *Desertion caused by acts of plaintiff.*

When the conduct of the husband is such as to cause the wife to

DIVORCE—Continued.

leave her husband, and subsequent conduct shows that his intention is to get rid of her as soon as possible, using the excuse that she voluntarily left him, a divorce will not be granted to him. *Nishihara v. Nishihara*, 189.

DOMESTIC RELATIONS.

See **CONTRACTS**, 1; **DIVORCE**.

DOWER.

See **WILLS**, 4.

EASEMENTS.

1. *Injunction—irreparable injury.*

Injunction will lie to protect the owner of an easement in its enjoyment when the injury complained of is irreparable, or the interference is of a continuous character, or the remedy at law for damages will not afford an adequate remedy. *McBryde Sugar Co. v. Andrade*, 578.

EJECTMENT.

Legal and equitable titles—equitable estoppels.

Subject to the exception by which equitable estoppels are admitted the rule is that actions of ejectment deal only with legal titles to land. *Magoon v. Kapiolani Estate*, 510.

ELECTIONS.

1. *Organic Act—amendment of election laws.*

Section 85 of the Organic Act, as amended June 28, 1906, authorizing the legislature of the Territory to alter or amend the election laws of the Territory, does not authorize the legislature to provide by statute for the election of members of the legislature at a time other than that fixed by section 14 of the Organic Act for the holding of general elections. *Cooke v. Thayer*, 247.

2. *Primary elections—Act 151 of the Laws of 1913, construed.*

The proviso contained in section 16 of Act 151 of the Session Laws of 1913, to the effect that any candidate at a primary held pursuant to the Act in the month of September who receives a majority of the votes of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate, cannot legally apply to candidates for membership in the legislature in view of the provision of section 14 of the Organic Act that general biennial elections for members of the legislature shall be held on the Tuesday next after the first Monday in November. *Cooke v. Thayer*, 247.

See **CORPORATIONS**, 2, 3; **MANDAMUS**, 1; **WILLS**, 4; **QUO WARRANTO**, 2.

EMBEZZLEMENT.**1. County employee—evidence of office routine.**

Where the duties of an officer or employee of a county are not defined by any law or ordinance the prescribed or established practice and routine of the office or department in which he is engaged may be shown in evidence in proof of the allegation that such officer or employee was charged or entrusted with the possession, custody or control of moneys belonging to the county, it not being necessary that his custody of public money as such officer or employee should be expressly authorized by statute or ordinance. *Territory v. Kealoha*, 116.

2. Ownership of moneys embezzled.

On the trial of an employee of a county charged with the embezzlement of certain moneys which were the proceeds of a sale of rock taken from a certain quarry of which the county was in possession it is immaterial that the county had no title or only a defective title to the quarry, the defendant claiming no right or title thereto himself. *Territory v. Kealoha*, 116.

3. Receipt of money under color of authority—estoppel.

One who has collected money under color of authority cannot defend against a prosecution for embezzlement on the ground that he was not authorized to collect it. *Territory v. Kealoha*, 116.

4. Proceeds of sale of county property—validity of sale.

It is no defense to a charge of embezzlement of moneys derived from a sale of property by a county that the sale was not made in the manner prescribed by statute. *Territory v. Kealoha*, 116.

5. Indictment—allegation and proof.

A. was indicted charged with embezzling certain bonds which were in his possession by the consent and authority of a certain incorporated lodge, the owner, by converting them to his own use, unlawfully, wilfully, fraudulently and feloniously, and without the consent of such owner. The evidence showed that he was a trustee, and treasurer of the board of trustees, of said lodge, and as such received the bonds, sold them, and used the proceeds: Held that the verdict and judgment of conviction should not be set aside on the ground of variance between allegation and proof. *Territory v. Armstrong*, 526.

6. Demurrer or motion to quash indictment—waiver.

If an indictment under section 3934 R. L. 1915, charging embezzlement, be defective in that it fails to allege the fiduciary relation under which property charged to have been embezzled was received by the defendant, a question not decided, an objection for that reason should be made by demurrer or motion to quash, prior to plea; and, if not so made, such objection is waived. *Territory v. Armstrong*, 526.

See EVIDENCE, 8, 9, 10, 11, 12.

EMPLOYERS AND EMPLOYEES.

See COUNTIES, 3; EMBEZZLEMENT, 1, 2.

EQUITABLE ESTATES.

See TRUSTS, 2.

EQUITABLE ESTOPPELS.

See EJECTMENT, 1.

EQUITY.

1. *Motion to vacate decree.*

An appeal does not lie from an order overruling a motion to open a decree in equity. *Nakeu v. Mahaulu*, 750.

2. *Finding of trial judge—weight.*

The finding of a trial judge in an equity case upon an issue of fact the determination of which depends largely upon the weighing of conflicting testimony is entitled to great weight. *De Souza v. Soares*, 17.

3. *Interest of complainant in subject-matter—cancellation.*

In order to maintain a suit in equity the complainant must have an interest in the subject-matter. In a suit to cancel two deeds, alleged to be forgeries, on the ground that they constitute clouds upon complainant's title, where it appeared that the complainant had no title to the land described in the deeds, the bill was properly dismissed. *Palau v. Heleman Land Co.*, 357.

4. *Finding of trial judge—weight.*

On an appeal in an equity case the findings of fact made by the circuit judge are not binding on the supreme court, but where the findings rest upon the credibility of witnesses and the weight of oral testimony, and inferences to be drawn from such testimony, and involve the consideration of opinion evidence, the findings of the judge who saw and heard the witnesses are entitled to much weight. *Sumner v. Jones*, 391.

5. *Jurisdiction—master in chancery.*

It is the usage and practice of courts of equity to refer causes to a master in chancery with directions to hear evidence, and to report findings of fact, and such other matters pertinent to the cause of which the court should be advised, and the power to do so has not been abrogated by section 1648, R. L., but is recognized by section 1834, R. L. *Scott v. Stuart*, 459.

6. *Pleading—amendment of bill.*

Where after a demurrer to a bill in equity has been sustained leave is asked to file an amended bill it is within the discretion of the judge to allow it if the proposed bill is not "a new bill." *Honolulu Athletic Park, Ltd., v. Lowry*, 475.

7. *Injunction bill—useless and ineffectual amendments.*

Leave to file an amended bill for an injunction should be refused where the time for which the injunctive relief is sought has

EQUITY—Continued.

passed. Useless and ineffectual amendments to pleadings are properly disallowed. *Honolulu Athletic Park, Ltd., v. Lowry*, 475.

8. *Pleading—proper parties to bills.*

One who has an interest in the subject matter of a suit in equity, though not interested in the controversy between the immediate litigants, is a proper party to the suit. *Pond v. Montgomery*, 241.

9. *Misjoinder of defendants—who may raise objection.*

An objection for misjoinder of defendants may be made only by the defendant improperly joined, at least where his joinder will not affect the decree against the proper defendant. *Pond v. Montgomery*, 241.

10. *Injunction—jurisdiction.*

Equity has jurisdiction to protect a legal right in property by injunction where plaintiff's right is clear and the court is of the opinion, on the evidence before it, that there is no substantial dispute as to it, though the right is denied and it has not been established at law. *McBryde Sugar Co. v. Andrade*, 578.

11. *Restraining commission of criminal acts.*

Where the issuance of an injunction is warranted by the necessity of protection to legal rights in property, the commission of criminal acts may incidentally be enjoined. *McBryde Sugar Co. v. Andrade*, 578.

12. *Pleading—verification of bill.*

A jurat to a bill in equity by which the complainant deposes that "the matters and things therein stated are true of his own knowledge, save as to the matters therein alleged upon information and belief, and those he believes to be true," is in compliance with rule 25 of the circuit court of the first circuit. *Waiwaiote v. Kulaea*, 651.

See DEEDS, 1; LANDLORD AND TENANT, 3; PLEADING, 1; SPECIFIC PERFORMANCE, 1.

ESTOPPEL.

1. *Misrepresentation—knowledge of facts.*

In order to establish an estoppel based upon a misrepresentation of a material fact the party asserting the estoppel must show that he relied on the truth of the representation, and it is a rule of general application that there can be no estoppel for misrepresentation where the party asserting it knew the facts or had at hand ready means of ascertaining them before he acted. *Horner v. Horner*, 9.

2. *Proof of title to land—title from common source.*

When both parties to an action involving title to land claim title from the same grantor, neither can take advantage of alleged de-

ESTOPPEL—Continued.

facts in the chain of title prior to the common source. *Harrison v. Davis*, 51.

See DIVORCE, 6, 7; EMBEZZLEMENT, 3; EVIDENCE, 5; INJUNCTION, 3; JUDGMENT, 5.

EVIDENCE.

1. *Mental condition—opinion.*

An ordinary witness called to testify as to the mental condition of another should be required to state, at least in a general way, the facts upon which his opinion is founded. *Sumner v. Jones*, 23.

2. *Sufficiency of offer of proof.*

Where offers of proof were made of the opinions of witnesses as to the mental condition of the plaintiff without outlining the facts upon which the opinions were based, held, that the objections being on general grounds only the witnesses should have been examined. *Sumner v. Jones*, 23.

3. *Admissions in pleadings in another suit.*

The allegations in a pleading in one suit, while open to explanation or rebuttal, are receivable as against the party in a subsequent suit as his solemn admission of the truth of the facts so alleged. *Harrison v. Davis*, 51.

4. *Signature to written orders.*

Oral evidence is not admissible to prove who signed written orders where no grounds for secondary evidence have been laid, and it is not shown that it is not within the power of the party to produce such written orders. *Ripley & Davis v. Kapiolani Estate*, 86.

5. *Admissions—opinions.*

A mere opinion or conclusion, as distinguished from a statement of fact, may not be proved under the rules relating to admissions and declarations. The opinion of an agent based upon a past occurrence is not provable as the admission of his principal, nor as a contemporaneous construction affecting the liability of his principal under a contract with another, nor as the basis of an estoppel against his principal. *Wall v. Focke*, 221.

6. *Scintilla—verdict.*

To amount to more than a scintilla the evidence must be of a character sufficiently substantial, in view of all the circumstances of the case, to warrant the jury, as triers of the facts, in finding from it the fact to establish which the evidence was introduced. *Holstein v. Benedict*, 441.

7. *Embezzlement—proof of existence of corporate owner.*

Evidence, documentary and otherwise, showing that the alleged owner of property charged to have been embezzled is a domestic corporation, and organized as such, is admissible on the trial of

EVIDENCE—Continued.

one charged with embezzling the property of such corporation. *Territory v. Armstrong*, 526.

8. *Evidence tending to show value.*

Where the indictment charged the embezzlement by defendant of certain bonds owned by one corporation, issued by another corporation, evidence that the latter was incorporated, issued the bonds named in the indictment and secured them by mortgage, is admissible as tending to show that the bonds embezzled were of value. *Territory v. Armstrong*, 526.

9. *Corpus delicti—order of proof.*

Evidence tending to establish the *corpus delicti* should be introduced before admitting declarations made by defendant inconsistent with the facts; and where checks received by the defendant as proceeds of securities embezzled were indorsed by him and cashed, his indorsements of such checks should be proven before they are admitted in evidence, but if admitted out of their regular order, and evidence of his indorsements is later introduced, the order of proof becomes immaterial. *Territory v. Armstrong*, 526.

10. *Evidence showing value of embezzled property.*

Evidence showing the market value of property embezzled at the time of the alleged embezzlement is admissible. *Territory v. Armstrong*, 526.

11. *Written declarations of a third party.*

On a trial on the charge of embezzlement, the complaint of a third party in a civil action claiming the property charged to have been embezzled, is not admissible, the same being an *ex parte* declaration which is not competent to prove the ownership of the embezzled property. *Territory v. Armstrong*, 526.

12. *Instruments requiring to be stamped.*

The admission in evidence of an unstamped instrument required by law to be stamped, where it has been used by the trial court as the basis of a finding of fact or conclusion of law, is error. *O. R. & L. Co. v. Kail*, 673.

13. *Parol, to prove provisions of an ordinance.*

Parol evidence is not admissible, under the rule requiring the best evidence obtainable, to prove provisions in a municipal ordinance. *Territory v. McGregor*, 786.

14. *Judicial notice of rules of court.*

Rules made by a judge of a circuit court, and approved by the supreme court should be judicially noticed by the latter. *Schoening & Co. v. Miner*, 196.

15. *Quieting title—proof of title.*

Ordinarily, upon an issue of title, the plaintiff introduces evidence to prove that his title was in its inception derived from the government and thence passed to him by mesne conveyances, devise,

EVIDENCE—Continued.

descent or adverse possession. *Harrison v. Davis*, 51.

See ADVERSE POSSESSION, 1, 2, 4; APPEAL AND ERROR, 5, 16, 20, 23, 38; ASSUMPSIT, 1; ATTORNEY AND CLIENT, 1; BANKRUPTCY, 6, 7, 8; CONSTITUTIONAL LAW, 6, 7; CONTRACTS, 2; CORPORATIONS, 1; DIVORCE, 2; EMBEZZLEMENT, 1; INTOXICATING LIQUORS, 2; REPLEVIN, 1, 2.

EXCEPTIONS, BILL OF.

1. *Exception to instruction—too general.*

A general exception to the oral charge given by the court, when such charge consists of a series of propositions, cannot be sustained if any portion thus excepted to is sound. *Territory v. Peter*, 132.

2. *Failure to incorporate transcript of evidence.*

A transcript of evidence, not made a part of the bill of exceptions by reference or otherwise, cannot be considered by the appellate court, and in such a case, an exception to a ruling and order of the lower court on the ground that it was contrary to the law and the evidence, will be overruled. *Smithies v. Notley*, 519.

See APPEAL AND ERROR, 6, 7, 10, 16, 18, 21, 22, 30, 33; STATUTES, 4.

EXECUTION.

1. *Sale of leasehold interest in pond—fish.*

Fish in a private pond, unconnected with public waters, do not pass by sale of a leasehold interest in the pond made under execution, the levy and notice of sale being silent as to the fish, and the execution defendant being admitted to be the owner of the fish at the time of the levy and sale. *Murphy v. Hitchcock*, 665. See APPEAL AND ERROR, 9, 23; 26; PRINCIPAL AND SURETY, 6.

EXECUTORS AND ADMINISTRATORS.

1. *Partial distribution—surcharging account.*

Where, prior to final settlement, an administrator, by ex parte petition, procures an order permitting him to distribute nearly all the funds in his hands, one-third to the widow, and two-thirds to a son, of the deceased, stating in his petition that they are the heirs of deceased, and makes such payments, after which another child of deceased, a daughter, appears and claims a distributive share in the estate, it is proper to surcharge the accounts of the administrator to the extent of one-half of the amount paid by him to the son. *Estate of D. H. Davis*, 436.

2. *Special administrators, right to appoint.*

The circuit judges in this Territory, in the exercise of the jurisdiction in probate conferred upon them by law, have authority, in proper cases, to appoint special administrators whose duty it

EXECUTORS AND ADMINISTRATORS—Continued.

would be to collect and conserve the property of the estate for the time being and until the appointment of a permanent executor or administrator. *Estate of Luttet*, 712.

See APPEAL AND ERROR, 1; PRINCIPAL AND SURETY, 1.

EXEMPTIONS.

See APPEAL AND ERROR, 26; BANKRUPTCY, 1, 2, 3.

EXHIBITS.

See PLEADING, 1.

EX PARTE DECLARATIONS.

See EVIDENCE, 11.

EX POST FACTO LEGISLATION.

See CONSTITUTIONAL LAW, 2.

EXPRESS CONTRACTS.

See CONTRACTS, 2.

EXTRINSIC EVIDENCE.

See WILLS, 7, 8.

FIDUCIARY RELATIONS.

See PRINCIPAL AND AGENT, 1, 2.

FINAL DECREES, JUDGMENTS OR ORDERS.

See APPEAL AND ERROR, 11, 12, 14; COSTS, 1.

FINDINGS OF FACT.

See NEW TRIAL, 1.

FISH.

1. *Ownership of when confined.*

Where one catches fish in public waters and confines them in a private pond having no outlet to public waters, he becomes the owner of such fish and may recover their value from another wrongfully taking them from his possession. *Murphy v. Hitchcock*, 665.

See EXECUTION, 1.

FORECLOSURE.

See MORTGAGEES, 1.

FRAUD.

1. *Burden of proof.*

In a suit to cancel a deed on the ground that it was obtained by undue influence and misrepresentation the burden of proving the fraud is, in the absence of a fiduciary relation, upon the grantor who charges it. *De Souza v. Soares*, 17.

See ESTOPPEL, 1.

GARNISHMENT.

1. *Seaman's wages.*

The wages of a seaman who has not shipped through a shipping commissioner, but was directly employed by the owner of a vessel engaged in the merchant trade between ports in this Territory, are subject to garnishment. Affirming *Schnack v. Clark*, 21 Haw. 661. *Byrne v. Kaleiki*, 160.

2. *Attachment of debt after judgment—form of order citing judgment debtor.*

Under R. L. Sec. 2117, the direction to the judgment debtor should be to appear for examination as to any and what debts are owing to him, but it is not such a defect as to require the quashal of the order that the direction was to appear and show cause why a particular debt due to him should not be attached and paid to the judgment creditor. Both debtor and garnishee may be summoned at the same time and pursuant to the one order. *Volcano Stables & Transportation Co. v. Ferry*, 229.

3. *Nature of proceeding—nonresident defendant.*

The garnishment of a debt due to a nonresident, unless he appears in the action, is a proceeding *quasi in rem*. Actual service upon the garnishee within the Territory gives the court jurisdiction over the *res*. Service of process on the defendant is not necessary, but reasonable constructive notice of the attachment must be given. *Kerr & Co. v. Greenbaum*, 321.

4. *Service of process on garnishee sufficient notice to nonresident defendant.*

Under Sec. 2114 R. L. service of process upon the garnishee is sufficient notice to a nonresident defendant who has never resided in this Territory to enable the plaintiff to bring the action to trial though the garnishee be the mere debtor of the defendant. But before judgment be entered the defendant should have had a reasonable opportunity to contest the plaintiff's claim. *Kerr & Co. v. Greenbaum*, 321.

5. *Request for process—summons.*

A prayer contained in plaintiff's complaint in an action in a circuit court that the garnishee "be summoned to appear and answer this demand as is by law provided," is a sufficient request for the issuance of a summons to the garnishee in a form appropriate to the requirements of R. L. 1915, Sec. 2801. *Payne v. Furtado*, 723.

6. *Garnishee summons—copy—certification.*

A copy of the original summons served upon a garnishee as required by law, which is certified by a deputy sheriff to be a true copy, need not bear the original signature of the clerk nor the impress of the seal of the court out of which it issued, if it shows

GARNISHMENT—Continued.

upon its face that the original was signed by the clerk and bore the seal of the court. *Payne v. Furtado*, 723.

7. *Time for appearance of garnishee—waiver of irregularity.*

The time specified in the summons for the appearance of the garnishee should be the same as that of the defendant. An irregularity in the designation of the time for appearance will be waived by making a general appearance in the cause. *Payne v. Furtado*, 723.

8. *Travelling fees and expenses of garnishee.*

The status of an order for execution entered against a garnishee who has not appeared is not affected by the failure to tender him the amount of his fees and expenses. *Payne v. Furtado*, 723.

9. *Non-appearance of garnishee—notice of hearing—judgment.*

Where no action is had or order made in court on the return day, the defendant having previously confessed judgment, the garnishee is entitled to notice of any proceeding subsequently to be had affecting his rights. Before a valid judgment can be entered against a garnishee who has not appeared the plaintiff must show by evidence the value of the property in the garnishee's hands belonging to the defendant, or the amount of the debt due to the defendant. Where judgment has been obtained against the defendant upon his default or confession, the garnishee may appear and make his disclosure at any time before judgment has been entered against him. *Payne v. Furtado*, 723. See COURTS, 3.

GRAND JURY.

See INDICTMENT AND INFORMATION, 1, 3.

HARMLESS ERROR.

See APPEAL AND ERROR, 16.

HAWAIIAN LANGUAGE.

See WILLS, 2.

HEALTH.

1. *Insanitary lands—applicability of R. L. Chap. 83 to improved lands.*

Said chapter is not limited in its operation to vacant lands. There is no exception in favor of lands upon which buildings have been erected, though their erection was not in violation of law and the buildings themselves are in good condition. Any loss or expense to which the owner may be subjected in connection with buildings upon lands which are required to be filled in must be regarded as incidental to the exercise of the power to require the abatement of insanitary conditions. *Magoon v. Lord-Young Engineering Co.*, 327.

HEALTH—Continued.

2. *Owner—life tenant—remainderman—right of owner to notice under R. L. Secs. 1026 and 1027.*

The word "owner" as used in R. L. Chap. 83, means one having a present interest in land with the right of possession other than a mere tenant or temporary occupant. A tenant for life is such an owner. A remainderman is not. An owner is not affected by proceedings instituted under the statute in the absence of notice given as provided in sections 1026 and 1027. Remaindermen would be entitled to be heard in another proceeding upon the claim, if it be made, that the operation proposed to be effected on the land is without authority of law and threatens unjustifiable injury to the inheritance. *Magoon v. Lord-Young Engineering Co.*, 327.

3. *Sufficiency of notices—process—judgment—certainty.*

The notice required to be given under the statute serves the purpose of process by means of which jurisdiction of the land owner is obtained, and such notice may become, and, in the absence of an appeal, does become what, in effect, is a final judgment. It must, therefore, be certain. A notice to a land owner to fill his land "to such grade that the surface of said piece of land when so filled in will be, as near as may be, in the same plane with the established grades of the streets nearest to said piece of land" when the grades of such streets have not been legally established is uncertain and insufficient, and is not to be regarded as capable of being rendered certain by the fact that there were maps in possession of the public authorities and available to inspection which showed the grades contemplated, such maps not having been referred to in the notice. *Magoon v. Lord-Young Engineering Co.*, 327.

4. *Effect of failure of owner notified to appeal—findings of board of appeal—questions of law and fact—nuisance.*

The question whether a thing may or may not be a nuisance within some provision of law must be settled as one of fact, and not of law. Upon a hearing before the appeal board, if an appeal be taken as allowed by the statute, the property owner could contest the finding of the board of health that his premises are in an insanitary or dangerous condition, and the recommendation that they should be treated in the manner outlined in the notice. The finding of the appeal board would be conclusive and binding if there was any substantial evidence to support it. But the land owner would be entitled to be heard in court on the contention that his land, not being in an insanitary condition or deleterious to health, and there being no facts upon which a conclusion that it was in such condition could rest, the board of health had exceeded its powers and proceeded without jurisdiction, as such

HEALTH—Continued.

contention would raise a question of law. *Magoon v. Lord-Young Engineering Co.*, 327.

5. *Propriety of hydraulic method to fill land, and of the material thereby used—vacant land—occupied land.*

In filling and raising the level of insanitary land through proceedings under the statute, it is within the discretion of the superintendent of public works to contract for the filling of vacant lands by the hydraulic method and with the material used by that method in the manner described in this case. But where, in case land is occupied, such method would cause loss through the interruption of the use of premises for business or other purposes which might be avoided by following some other reasonable method, the hydraulic method is subject to objection by the land owner. If objection be made the land owner would assume the consequences of insisting on a more expensive fill. The material used in the hydraulic method held not to be injurious to lands situated as those of the Kewalo district in Honolulu. *Magoon v. Lord-Young Engineering Co.*, 327.

HEARSAY.

See ADVERSE POSSESSION, 1, 2.

HEEDLESS DRIVING.

See CRIMINAL LAW, 6.

HIGHWAYS.

1. *Obstruction—nuisance.*

The unlawful obstruction of a highway is a public nuisance against the continuance of which a private individual who suffers special and irreparable injury, may obtain an injunction. *Ideta v. Kuba*, 28.

See INJUNCTION, 1.

HOUSE OF ILL FAME.

See CRIMINAL LAW, 1.

HUSBAND AND WIFE.

1. *Agency of wife for husband.*

The marital relation does not create a wife the agent of her husband to state an account on his behalf. *Borba v. Leal*, 1.

2. *Necessaries—proof of delivery.*

In an action against the husband for goods sold and delivered to the wife, recovery cannot be had without proof of delivery. *Borba v. Leal*, 1.

3. *Necessaries—legal services.*

A complaint in assumpsit for legal services rendered by an attorney at the request of a married woman in procuring warrants

HUSBAND AND WIFE—Continued.

of arrest against her husband upon charges of assault and battery, in the absence of allegations to the effect that the public officials whose duty it is to issue warrants and prosecute offenses had refused to act, and that the accusations were well founded, and that the services rendered were necessities, does not set forth a cause of action against the husband. *Ching On v. Lewis*, 377.

See DIVORCE.

HYDRAULIC FILL.

See HEALTH, 5.

IMPLIED CONTRACTS.

See CONTRACTS, 1, 2.

INDECENT ASSAULT.

See CRIMINAL LAW, 5; INDICTMENT AND INFORMATION, 5.

INDETERMINATE SENTENCE.

See CONSTITUTIONAL LAW, 5.

INDICTMENT AND INFORMATION.

1. *Grand jury.*

An indictment is not rendered invalid by reason of the participation in the finding of it of a grand juror who had been instructed by the court to take no part in the deliberations of the jury concerning another and different charge against the accused, as to which the juror had formed an opinion adverse to the accused in the absence of evidence of general bias or prejudice on the part of the juror. *Territory v. Kealoha*, 116.

2. *Demurrer—obstructing the course of justice.*

An indictment which charges the defendants in one count with having unlawfully, maliciously and fraudulently combined and mutually undertaken and concerted together to obstruct the course of justice by giving to a witness a sum of money to evade giving his testimony in a civil proceeding before the board of license commissioners on a hearing of an application for a license to sell intoxicating liquors; in another count with having unlawfully, maliciously and fraudulently concerted together and did suppress the evidence of a certain witness in such proceeding; in another count with having willfully intended to prevent and obstruct the course of justice, wrongfully, unlawfully and willfully, evaded, hindered and prevented the said witness from appearing before said board to give his evidence, and did there and then and thereby suppress the evidence of said witness in such proceeding, is good as against a demurrer on the ground of in-

INDICTMENT AND INFORMATION—Continued.

sufficiency, and such demurrer should be overruled. *Territory v. Scully*, 618.

3. *Motion to quash—irregularity in making grand jury list.*

A motion to quash an indictment on the ground of irregularities in selecting the list of persons to act as grand jurors should be overruled, as challenges to the panel, and to individual jurors, can only be made by the prosecuting officer, or by some person held to answer a criminal charge, and must be made before the grand jury is sworn. *Territory v. Scully*, 618.

4. *Material allegations—circumstances of aggravation.*

Where there are several phases of the same kind of crime with varying circumstances of aggravation it is not necessary in an indictment for the simpler offense to negative circumstances of aggravation embraced in the graver. *Territory v. Tan Yick*, 773.

5. *Indecent assault.*

In an indictment for indecent assault under R. L. 1915, Sec. 3897, it is not necessary to allege that the assault was committed "without committing or intending to commit the crime of rape." *Territory v. Tan Yick*, 773.

See EMBEZZLEMENT, 5, 6.

INHERITANCE TAX.

See CONSTITUTIONAL LAW, 8; TAXATION, 1.

INJUNCTION.

1. *Obstruction of highway—pleading.*

In a bill to enjoin the obstruction of a public highway the thoroughfare should be described as a public road or highway, but the manner in which it became such need not be alleged. *Ideta v. Kuda*, 28.

2. *Right affected by delay.*

Delay in commencing proceedings to enjoin a nuisance is a fact to be considered with other facts in determining whether an injunction should be granted. *Ideta v. Kuda*, 28.

3. *Right to injunction as affected by laches—legal right.*

Where an injunction is asked in support of a strict legal right, the party is entitled to it if his legal right is clear; mere delay unaccompanied by circumstances constituting an estoppel will not defeat the remedy unless it has continued so long as to defeat the right itself. That expenditures have been made will not defeat the right to an injunction if the party otherwise is entitled to it. *Magoon v. Lord-Young Engineering Co.*, 327.

4. *Right to must be clear.*

Temporary injunctions do not issue as a matter of right except in cases where the right to such relief is clear and beyond doubt. *Consolidated Amusement Co. v. Hughes*, 550.

INJUNCTION—Continued.

5. *Pleading.*

The probative facts—not conclusions—showing the right to a temporary injunction must be stated in the bill for injunction, else it will be denied. *Consolidated Amusement Co. v. Hughes*, 550.

6. *Statute relating to contracts for personal service.*

Section 10, of the Organic Act creating the Territory of Hawaii, which prohibits suits upon contracts for personal service, except actions for damages for breaches thereof, does not prohibit injunctions to restrain the exhibition or dealing in motion picture films in violation of a contract not to exhibit or deal in such films. *Consolidated Amusement Co. v. Hughes*, 550.

7. *Modification of.*

Where an injunction awarded by a decree in equity is broader than the decree it may be modified upon application to the circuit judge, and the affirmation of the decree on appeal will not preclude such action. *McBryde Sugar Co. v. Andrade*, 578.

8. *Breach of contract.*

A party to a contract will not be enjoined from breaking it when such action would compel him to break a contract with an innocent third person to the injury of the latter. *Consolidated Amusement Co. v. Hughes*, 550.

See APPEAL AND ERROR, 11; EASEMENTS, 1; EQUITY, 7, 10; MASTER AND SERVANT, 1, 2, 3, 4; PLEADING, 4.

INSANITARY LANDS.

See CONSTITUTIONAL LAW, 4; HEALTH, 1.

INSOLVENCY.

See BANKRUPTCY.

INSTRUCTIONS.

1. *Interest of witness.*

An instruction which told the jury to take into consideration the interest of the plaintiff in the result of the suit when weighing his testimony was properly refused, especially as the court had instructed the jury that in weighing the evidence of witnesses they should take into consideration the interest, if any, of the witness, in the result of the suit. *Ward v. I.-I. S. N. Co.*, 488.

See APPEAL AND ERROR, 18, 28, 29; CRIMINAL LAW, 6; DAMAGES, 1; INTOXICATING LIQUORS, 1.

INTEREST.

See APPEAL AND ERROR, 17.

INTEREST BY IMPLICATION.

See TRUSTS, 4.

INTEREST IN SUBJECT MATTER OF SUIT.

See APPEAL AND ERROR, 2; EQUITY, 3, 8; INSTRUCTIONS, 1.

INTERLINEATIONS.

See ALTERATION OF INSTRUMENTS, 1;
APPEAL AND ERROR, 10.

INTERLOCUTORY ORDERS.

See APPEAL AND ERROR, 27.

INTERPOLATION IN STATUTE.

See STATUTES, 8.

INTERLOCUTORY DECREES, JUDGMENTS OR ORDERS.

See APPEAL AND ERROR, 11, 13.

INTERVENING CAUSE, OF INJURY.

See MASTER AND SERVANT, 4.

INTOXICATING LIQUORS.

1. *Keeping for sale without a license—charge of court to the jury.*

Under the facts in this case, held, it was not error for the court charge the jury, if you believe, beyond a reasonable doubt, that the defendant had or kept posted about his place of business such a receipt or stamp, such fact is competent evidence that he kept intoxicating liquors for sale. Beyond this it is not necessary for the prosecution to show that the defendant did at any time sell intoxicating liquors." *Akana v. Territory*, 479.

2. *Same—same—proof of actual sales not necessary.*

One may be convicted of unlawfully keeping intoxicating liquor for sale without proof that he actually sold any liquor or offered or exposed it for sale. *Akana v. Territory*, 479.

See CRIMINAL LAW, 4; STATUTES, 12.

INVESTMENT OF TRUST FUNDS.

See TRUSTS, 6, 7.

IRREPARABLE INJURY.

See EASEMENTS, 1.

JUDGES.

1. *Supreme court—disqualification of member of.*

A justice of the supreme court, who was before his appointment a member of a firm of attorneys which represented one of the parties to a suit, but who severed his connection with the firm shortly after the preliminary pleadings were filed, and before the suit went to trial, is disqualified by sec. 84 of the Organic Act from sitting as a member of the court on appeal, though he took

JUDGES—Continued.

no part whatsoever in the preparation of the case, never discussed it with the other members of the firm, and received no compensation for the work done prior to his resignation from the firm. *Magoon v. Lord-Young Engineering Co.*, 245.

See EQUITY, 2; MANDAMUS, 3; TRIAL, 1.

JUDGMENT.

1. *Opening default.*

An order of default should be set aside and defendant permitted, upon reasonable terms, to defend, when he has made application therefor immediately after expiration of the time to answer and when he shows a defense on the merits, a reasonable excuse for his failure to answer and the absence of prejudice to plaintiff. *Bond v. Hawaiian Gazette Co.*, 60.

2. *Nonsuit.*

A judgment of nonsuit is no bar to another action for the same cause. *Vivas v. Aswan*, 11. Haw. 282. *Stockwell v. I.-I. S. N. Co.*, 206.

3. *Nonsuit—res adjudicata.*

A judgment of nonsuit is not an adjudication on the merits but leaves the parties in the same condition, so far as the cause of action is concerned, as though no action had been instituted, and hence cannot constitute *res adjudicata*. *Stockwell v. I.-I. S. N. Co.*, 206.

4. *Partition—res adjudicata—replevin.*

K, one tenant in common, built a house on the undivided lands, after which, in partition, the land upon which the house stood was allotted to another cotenant without reservation to K of the house; held, the decree is *res adjudicata*, and binding upon K. *Ahoi v. Pacheco*, 257.

5. *Estoppel—res judicata.*

Where a demurrer has been sustained because of the omission of the plaintiff to set forth in his complaint an allegation material to the cause of action attempted to be stated the judgment of dismissal will not be a bar to a fresh action the complaint in which includes the allegation previously omitted. *Hackfeld & Co. v. I.-I. S. N. Co.*, 671.

6. *Opening default—affidavit of defense on the merits.*

Upon an application to open a default on the ground, *inter alia*, that the applicant has a good and meritorious defense, it is not necessary to detail the evidence claimed to support the defense or to present the affidavits of the witnesses who will, if permitted, give the evidence. It is sufficient to show by any credible evidence that a *bona fide* defense exists, and what the facts relied upon are in order that the court may determine for itself that

JUDGMENT—Continued.

they constitute a good defense in law. *Bond v. Hawaiian Gazette Co.*, 60.

See APPEAL AND ERROR, 40; GARNISHMENT, 9; HEALTH, 3; LANDLORD AND TENANT, 3; PRINCIPAL AND SURETY, 1.

JUDGMENT DEBTOR.

See GARNISHMENT, 2.

JUDICIAL RECORDS.

See PLEADING, 1.

JURAT.

See EQUITY, 12.

JURISDICTION OF COURTS.

See BANKRUPTCY, 1; CONTEMPT, 1; COURTS, 1, 3, 4; CRIMINAL LAW, 4; EQUITY, 5, 10; LANDLORD AND TENANT, 1; MANDAMUS, 4; PROHIBITION, 1, 3, 4.

JURY.

See APPEAL AND ERROR, 18, 20, 21, 22; CONSTITUTIONAL LAW, 4; CRIMINAL LAW, 4; INSTRUCTIONS, 1; INTOXICATING LIQUORS, 1; MASTER AND SERVANT, 1, 3.

KNOWLEDGE, ALLEGATION OF.

See PLEADING.

LACHES.

See INJUNCTION, 3; LANDLORD AND TENANT, 5.

LANDLORD AND TENANT.

1. *Summary possession—title—jurisdiction.*

In a summary proceeding, plaintiff alleged a wrongful withholding by defendant after expiration of a parol lease; defendant filed a plea to the jurisdiction of the district court, supported by affidavit, denied the tenancy alleged, and alleged possession and right of possession under a written lease for years executed to another and by the latter assigned to him: *held*, that the title to real estate had "come in question," and the district court was ousted of jurisdiction. *Harrison v. McCandless*, 129.

2. *Primary question.*

In a summary proceeding by the landlord, to obtain possession of land from the tenant, the primary question is the restoration of the landlord to possession, and issues of title cannot be determined. *Harrison v. McCandless*, 129.

3. *Failure of lessor to deliver possession—relief in equity.*

The failure of the lessor to give the lessee possession, or the inability of the latter to obtain possession of the demised prem-

LANDLORD AND TENANT—Continued.

ises, is available by way of defense in an action at law to recover rent irrespective of the presence or absence of fraud on the lessor's part. Such an action, or the enforcement of a judgment obtained therein, will not be enjoined where the defense was not presented through the choice or fault of the defendant in the action unmixed with any fraud, fault or negligence on the part of the plaintiff, nor, under such circumstances, will equity compel the return of money paid in satisfaction of such a judgment. *Scott v. Pilipo*, 174.

4. *Tenants in common—possession—rent.*

Where the lessor and lessee are also tenants in common an ouster of the lessee by the lessor would constitute a defense to a claim for rent, but the mere retention of possession by the lessor would not constitute an ouster of the lessee nor terminate the obligation of the latter to pay rent. *Scott v. Pilipo*, 174.

5. *Claim for rent voluntarily paid—laches.*

Complainant's laches will defeat a claim in equity for the return of rent voluntarily paid under a lease where, if complainant ever had any ground for making such claim, over fourteen years have elapsed since it arose. *Scott v. Pilipo*, 174.

6. *Quiet enjoyment—specific performance—remedy at law.*

The legal remedy of a lessee for the breach of a covenant for quiet enjoyment is an action of ejectment or an action on the covenant for damages. Specific performance is a purely equitable remedy and is obtainable only in cases where the legal remedy would be inadequate, impracticable or doubtful. *Scott v. Pilipo*, 412.

7. *Summary proceedings—right to possession.*

In an action for summary possession of leased land it is incumbent on the plaintiff to show that he is entitled to the immediate possession of the premises. *Ahulii v. Yip Lan*, 739.

8. *Parol tenancy—notice to quit.*

In an action under Chap. 154, R. L. 1915, the plaintiff should allege and prove, not only that the relation of landlord and tenant exists, or has existed, between the plaintiff and defendant, but also how the tenancy was created, and, if by parol, that the statutory notice to quit was given. *Ahulii v. Yip Lan*, 739.

See ADVERSE POSSESSION, 4; EXECUTION, 1; MECHANICS' LIENS, 2; PARTIES, 1; SPECIFIC PERFORMANCE, 1; TRUSTS, 3.

LAPSED DEVISE.

See WILLS, 5.

LAW OF THE CASE.

See COURTS, 2.

LEGAL RIGHTS, ENFORCEMENT OF.

See INJUNCTION, 3.

LEGISLATIVE INTENT.

See STATUTES, 2.

LEGISLATIVE POWERS.

See TERRITORIES, 1.

LEGISLATURE.

See ELECTIONS, 1, 2.

LIBERAL CONSTRUCTION.

See STATUTES, 11; WILLS, 2.

LICENSES.

See CONSTITUTIONAL LAW, 2; INTOXICATING LIQUORS, 1, 2; STATUTES, 2, 10.

LIENS.

See PRINCIPAL AND SURETY, 2, 3, 4.

LIFE TENANT.

See HEALTH, 2, 6.

LIMITATION OF ACTIONS.

1. *Statute must be pleaded.*

Under rule 4 of the circuit court of the first judicial circuit the statute of limitations, as a defense in personal actions, must be specially pleaded, and the bar of the statute cannot be first urged by a motion for a nonsuit or by objection to the admission of evidence. *Kapela v. Gilliland*, 655.

2. *Personal privilege—waiver.*

The defense of the statute of limitations is a personal privilege which a party may exercise, or waive, but on his default the court cannot exercise the privilege for him. *Borba v. Kiana*, 721. See BILLS AND NOTES, 1.

LIQUOR LICENSE COMMISSIONERS.

See STATUTES, 12.

LOCAL ACTIONS.

See TRESPASS QUARE CLAUSUM FREGIT, 1.

MAINTENANCE AND SERVICES.

See CONTRACTS, 1.

MANDAMUS.

1. *Sufficiency of writ—demurrer—quo warranto.*

Where it appears from the recital of facts in an alternative writ of mandamus that the object of the proceeding is to determine

MANDAMUS—Continued.

the title of one, holding a certificate of election, to an office, a demurrer on the ground that the writ does not state facts sufficient to constitute a cause of action or entitle the petitioners to the writ demanded, will be sustained; it appearing from the petition that *quo warranto* is the proper remedy. *In re Sherwood*, 381.

2. *Purpose of writ.*

The writ of mandamus lies to compel action where the law imposes a duty to act, and there is a refusal to act, but not to negative or prevent action. *In re Sherwood*, 381.

3. *Disqualification of judge.*

Where a judge has determined that under the Organic Act of this Territory he is not disqualified from hearing a cause mandamus does not lie to make him reverse that decision and to assign the cause. *Scott v. Stuart*, 576.

4. *Courts—jurisdiction.*

Under the statutes of this Territory in cases of mandamus where the writ is directed to individuals original jurisdiction is vested in circuit judges at chambers, the jurisdiction of the supreme court in such cases being appellate only. *In re Pringle*, 589.

See CLERKS OF COURTS, 4.

MARKET VALUE.

See EVIDENCE, 10.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Defective appliance—injury—proximate cause.*

The defendant having negligently continued the use of a defective cable on its coal conveyor which, by reason of its defective condition, came off certain pulleys designed to hold it in position, and the plaintiff, an employee of the defendant on the conveyor, in attempting to restore the cable to its proper position was injured. The question, whether the proximate cause of the plaintiff's injury was the negligence of the defendant in failing to furnish a reasonably safe cable for use, is not a question of science or legal knowledge, but a question of fact for determination by a jury. *Ward v. I.-I. S. N. Co.*, 66.

2. *Negligence—defective appliance.*

If the master negligently furnishes unsuitable appliances for conducting his business by reason of which his servant is injured, he is responsible in damages to the servant for such injuries, although the latter may have been negligent, unless the negligence or the latter was the proximate cause, or a proximate cause, of the injury. *Ward v. I.-I. S. N. Co.*, 488.

MASTER AND SERVANT—Continued.**3. Proximate cause question for jury.**

Whether an act of negligence is the proximate cause of an injury is a question for the jury to decide where the evidence is conflicting; or where the answer depends upon matters of discretion, experience and judgment; and in all cases where more than one inference may be reasonably drawn from the facts which the evidence tends to prove. *Ward v. I.-I. S. N. Co.*, 488.

4. Intervening cause.

The master is not exempt from liability for an injury to his servant, caused by a defective appliance, by reason of an intervening act or cause, where the latter grew out of, was related to, and made necessary by, the negligence of the master in furnishing such defective appliance. *Ward v. I.-I. S. N. Co.*, 488.

MASTER IN CHANCERY.

See EQUITY, 5; PROHIBITION, 1.

MATERIAL ALLEGATIONS.

See INDICTMENT AND INFORMATION, 4.

MECHANICS' LIENS.**1. Construction of statute.**

The rule applicable to the construction of a mechanic's lien statute is that the requirements which are to be met by persons who may assert the lien must be strictly complied with, but that the remedial portions of the statute are to be liberally construed. *Lewers & Cooke, Ltd., v. (Wong Wong)*, 765.

2. Lien upon lessor's interest in leased land—covenant to erect building.

Under Chap. 162, R. L. 1915, where land is leased for a term of years and the lease contains a covenant on the part of the lessee to erect thereon a certain building which will revert to the lessor upon the determination of the lease, and the right of reentry upon non-payment of rent or other breach of covenant is reserved, the lessor and lessee are both "owners" within the meaning of the statute, and the lien of a material man who has furnished to the contractor materials which were used in the construction of the building will attach to the interest of the lessor in the land as well as to that of the lessee. *Lewers & Cooke, Ltd., v. Wong Wong*, 765.

See PRINCIPAL AND SURETY, 2, 3, 4.

MEETINGS.

See CORPORATIONS, 3.

MENTAL CAPACITY.

See DEEDS, 1.

MENTAL CONDITION.

See EVIDENCE, 1, 2.

MISJOINDER OF PARTIES.

See EQUITY, 9.

MISLEADING TITLE.

See STATUTES, 10.

MISREPRESENTATION.

See ESTOPPEL, 1; FRAUD, 1.

MORTGAGES.

1. *Foreclosure by sale—publication of notice.*

Under R. L. Sec. 2161, as amended by Act 108, Laws of 1911, it is sufficient to publish mortgage foreclosure notices in the English language only. *Weinzheimer v. Lufkin*, 183.

See TRUSTS, 7, 8.

MORTUARY FUND.

See BENEFICIAL ASSOCIATIONS, 3.

MOTIONS.

1. *Scope of motion to strike.*

When an official report, made at the request of the court, responds to the purpose for which it is intended, but contains matters which, in the opinion of a party affected thereby, are unnecessary and objectionable, his remedy is not by motion to strike the report as a whole, but by motion to strike out or expunge the objectionable matter. *In re McCarn*, 111.

MOTION TO DISMISS.

See APPEAL AND ERROR, 32.

MOTION TO QUASH.

See EMBEZZLEMENT, 6; INDICTMENT AND INFORMATION, 8.

MOVING PICTURES.

See INJUNCTION, 6.

MUNICIPAL CORPORATIONS.

1. *Civil service commission—rules—powers.*

The authority to make rules and regulations to govern the selection and appointment of persons to be employed in the police and fire departments of the city and county of Honolulu, granted to the commission by Act 51, Session Laws 1913, does not authorize the commission to make a rule requiring competitive examinations for the promotion of persons in the service, and a rule to that effect adopted by the commission is void. *Kamahu v. Bicknell*, 209.

MUNICIPAL CORPORATIONS—Continued.

2. *Civil service commission—appointments—compensation.*

Under section 2 of Act 51 of the Laws of 1913, the appointment of a clerk to the deputy sheriff by the sheriff of the city and county of Honolulu without the approval of the civil service commission is void, and a person so attempted to be appointed is not entitled to the salary of the office though he has performed the duties thereof. *Kalakiela v. Bicknell*, 216.

3. *Classification of positions—examinations.*

It is the duty of the civil service commission, under said Act, to classify the positions in the departments to which its functions relate and to adapt the examinations to which applicants are subjected to suit the different classes of positions to which appointments are sought. The appointing officer is not required to make an appointment from the list of eligibles furnished by the commission where it does not appear that such eligibles were examined with reference to their qualifications for the position sought to be filled. *Kalakiela v. Bicknell*, 216.

MUTUAL BENEFIT INSURANCE.

1. *Expense incurred in suit to recover mortuary benefit.*

A member of a benefit society having designated a beneficiary, thereafter designates the same beneficiary with others. In a suit brought by the beneficiary first named against the society to recover the mortuary benefit, the expense incurred by the society in the suit, under the by-laws of the society, shall be deducted from the benefit when paid, notwithstanding that the suit was decided in favor of the beneficiary and against the society. *Santo Antonio Society v. Rodrigues*, 4.

2. *By-laws of society—effect of.*

The by-laws of a benefit society, when properly adopted, measure the duties, rights and liabilities of the members. *Santo Antonio Society v. Rodrigues*, 4.

NECESSARIES.

See HUSBAND AND WIFE, 2, 3.

NECESSARY PARTIES.

See APPEAL AND ERROR, 25, 35, 36, 37.

NEGLIGENCE.

See COUNTIES, 3; DAMAGES, 1; MASTER AND SERVANT, 1, 2, 3, 4.

NEW PARTIES.

See PLEADING, 2.

NEW TRIAL.

1. *Hearing de novo—findings of fact.*

NEW TRIAL—Continued.

Where, in a case tried jury waived, the judgment has been set aside and a new trial ordered, the issues not being expressly restricted, the case is restored to the condition it was in before a trial was had, and the whole case is open for hearing and determination as though it had never been tried. *Wall v. Focke*, 221.

See APPEAL AND ERROR, 10.

NONJOINDER OF PARTIES.

See APPEAL AND ERROR, 25, 36, 37.

NON-PARTISAN CANDIDATES.

See PRIMARY ELECTIONS, 2.

NON-RESIDENT DEFENDANTS.

See GARNISHMENT, 3, 4.

NONSUIT.

See APPEAL AND ERROR, 26.

NOTICE.

See GARNISHMENT, 9; HEALTH, 2, 3; LANDLORD AND TENANT, 8; MORTGAGES, 1.

NUISANCE.

See HEALTH, 4; HIGHWAYS, 1; INJUNCTION, 1.

OBSTRUCTING THE COURSE OF JUSTICE.

See INDICTMENT AND INFORMATION, 2.

OFFER OF PROOF.

See EVIDENCE, 2.

OFFICERS.

1. *Promotion of police officer—civil service commission.*

The sheriff has authority to promote a sergeant of police, who has proved his fitness therefor, to the office of captain of police, when it can be done with advantage to the department, without examination or approval by the civil service commission. *Kamahu v. Bicknell*, 209.

2. *Bond—surety.*

Where an officer acting in a matter in which he is authorized to act, is guilty of official misconduct, he is not faithfully performing his official duties, and he and his surety are liable for resultant damages on his official bond. *County of Hawaii v. Purdy*, 272.

3. *De facto—compensation.*

Where a statute provides that an officer shall be appointed in a certain way, if such officer is appointed in a way different from

OFFICERS—Continued.

that provided by statute, and acts, he cannot recover for his services as an officer *de facto*. *In re Pringle*, 557.

See CLERKS OF COURTS, 1, 2, 3, 4; EMBEZZLEMENT, 1, 2; MANDAMUS, 1; QUO WARRANTO, 1.

OMISSIONS.

See WILLS, 6, 8.

OPEN ACCOUNT.

See ACCOUNT, 1, 2.

OPENING DEFAULT.

See JUDGMENT, 1.

OPIUM.

See CONSTITUTIONAL LAW, 6, 7; EVIDENCE, 1, 2, 5; STATUTES, 1.

ORAL EVIDENCE.

See EVIDENCE, 4.

ORDER OF PROOF.

See EMBEZZLEMENT, 10.

ORDINANCE.

See EVIDENCE, 13.

OWNER.

See HEALTH, 2; MECHANICS' LIENS, 2.

PAROL EVIDENCE.

See EVIDENCE, 13.

PAROL LEASE.

See LANDLORD AND TENANT, 1, 8.

PARTIES.

1. *Partition—lessees.*

While the lessee of a cotenant of land sought to be partitioned is a proper party to a suit for partition, the rule does not extend to one who is merely shown to have collected rents without showing that he is interested in the subject matter of the suit. *Scott v. Pilipo*, 252.

See APPEAL AND ERROR, 25, 35, 36, 37; PLEADING, 2; PRINCIPAL AND SURETY, 6, 7; QUO WARRANTO, 2.

PARTITION.

1. *Accounting—rents.*

In a suit for partition a cotenant may be required to account for rents collected by him from third parties for the use of the

PARTITION—Continued.

common land. *Waiwaiole v. Kulaea*, 651.

2. *Pleading—averment of title.*

In a bill for the partition of land the complainant must show that he is a tenant in common of an estate in possession. This requirement is met by averments that the complainant and the defendants (in undivided shares) own the land in fee simple. Actual possession by the complainant need not be averred. *Waiwaiole v. Kulaea*, 651.

See JUDGMENT, 4; PARTIES, 1.

PARTNERSHIP.

1. *Limitation upon authority of partner.*

Restrictions on a partner's authority do not affect third persons who deal with the firm without notice of them. *Hackfeld & Co. v. Yamamoto*, 455.

2. *Publication of notice.*

A partnership, duly registered, is not incapacitated from suing to recover upon an account for goods sold by it by reason of its failure to publish notice of the partnership as required by statute. *Schoening & Co. v. Miner*, 196.

See APPEAL AND ERROR, 5; BANKRUPTCY, 6; CORPORATIONS, 4, 5.

PENAL STATUTE.

See STATUTES, 11.

PERSONAL PRIVILEGE.

See LIMITATION OF ACTIONS, 2.

PLEADING.

1. *Bill in equity—exhibits.*

Where a record or other writing constitutes a substantial part of the claim upon which a complainant seeks relief it may be pleaded by describing it and averring its substance and legal effect, or it may be referred to in the bill and a copy annexed as an exhibit, but a judicial record merely referred to with a prayer that it be judicially noticed as if set out in full is not thereby made a part of the bill of complaint. *Scott v. Pilipo*, 174.

2. *New parties.*

The plaintiff in a partition suit presented a supplemental bill and motion seeking to have A made a party defendant, alleging that he, during a portion of the time the suit had been pending, had collected certain rents for a moiety of the land, but did not show that he was a lessee or otherwise interested in the subject matter of the suit; an order directing A to show cause why he should not be made a party defendant was made, and he appeared specially and moved that the order be vacated which was

PLEADING—Continued.

done: Held, that the order to show cause was properly vacated. *Scott v. Piliipo*, 252.

3. *Defective, aided by stipulation of facts and judgment.*

A complaint was defective in that a material fact was not alleged; defendant answered; at the trial the material fact, with other facts, was stipulated, without objection; the plaintiff recovered judgment. Held, that the defect was cured by the stipulation and judgment. *County of Hawaii v. Purdy*, 272.

4. *Amendment—demurrer—specific performance—injunction.*

Where an amended bill in equity seeking a decree of specific performance of a contract and an injunction to restrain the respondent from violating the terms of the contract shows on its face that the contract provided for a series of ball games to be played between certain dates, and the time within which such ball games were to have been played had expired prior to the time of filing the amended bill, the performance of the contract thereby becoming impossible, a demurrer to the amended bill was properly sustained. As both the remedy by specific performance and injunction were lost by lapse of time, the court was at the time of the filing of the amended bill powerless to grant the complainant either remedy. *Honolulu Athletic Park, Ltd., v. Lowry*, 585.

5. *Ultimate facts—knowledge.*

In pleadings it is necessary to allege only ultimate, as distinguished from evidential, facts. An allegation that a party had knowledge of a certain matter or thing is an allegation of an ultimate and traversable fact. *Hackfeld & Co. v. I.-I. S. N. Co.*, 671.

See APPEAL AND ERROR, 17; EQUITY, 6, 8, 12; INDICTMENT AND INFORMATION, 2, 3; INJUNCTION, 1, 5; LANDLORD AND TENANT, 8; LIMITATION OF ACTIONS, 1; MANDAMUS, 1; PARTITION, 1; QUIETING TITLE, 1; SPECIFIC PERFORMANCE, 1; TRESPASS QUARE CLAUSUM FREGIT, 1.

PLEADINGS AS EVIDENCE.

See EVIDENCE, 3.

POLICE.

See CONSTITUTIONAL LAW, 6, 7; CRIMINAL LAW, 3; OFFICERS, 1.

POLICE POWER.

See CONSTITUTIONAL LAW, 4; TERRITORIES, 1.

POSSESSION.

See LANDLORD AND TENANT, 3, 4, 7.

POWER OF APPOINTMENT.

See CONSTITUTIONAL LAW, 8.

PRACTICE.

See APPEAL AND ERROR, 34, 36, 37; BANKRUPTCY, 2, 4; CONTEMPT, 1; EMBEZZLEMENT, 5, 6, 10; GARNISHMENT, 2, 3, 4, 5; INDICTMENT AND INFORMATION, 3; LANDLORD AND TENANT, 8; PRINCIPAL AND SURETY, 6; PROHIBITION, 5; QUIETING TITLE, 3, 4; QUO WARRANTO, 3.

PREFERENTIAL TRANSFERS.

See BANKRUPTCY, 4, 5, 7, 8.

PRESUMPTIONS.

See CONTRACTS, 1; COUNTIES, 2; WILLS, 4.

PRESUMPTION AS TO DATE OF ALTERATION OF DEED.

See ALTERATION OF INSTRUMENTS, 1.

PRESUMPTION OF ADVERSE POSSESSION.

See ADVERSE POSSESSION.

PRIMA FACIE CASE.

See REPLEVIN, 1.

PRIMA FACIE EVIDENCE.

See BANKRUPTCY, 6.

PRIMARY ELECTIONS.

1. *Sec. 41, R. L. 1915, construed.*

The proviso contained in Sec. 41 R. L. 1915, to the effect that any candidate at a primary held pursuant to the act who receives the vote of a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate, held to apply to candidates for the office of supervisor where more than one is to be elected. *Akina v. Kai*, 520.

2. *Same—names to be placed on ballot for general election.*

At a primary election where one of the candidates for the office of supervisor in a district where three are to be elected receives a majority of the votes of the registered voters voting at such primary and is thereby elected as a supervisor and there remain but two supervisorial offices for that district to be filled at the ensuing general election, the names of only two candidates from each political party, together with the names of such non-partisan candidates as may have received not less than twenty per cent. of the votes of registered voters cast at such primary, should be placed on the ballot for such general election. *Akina v. Kai*, 520.

See ELECTIONS, 2; STATUTES, 7.

PRINCIPAL AND AGENT.

1. *Transactions between—conveyance by principal to agent.*

The rule that an agent to sell property may not sell it to himself is not involved in a transaction whereby the principal himself conveys property to his agent. *Sumner v. Jones*, 391.

2. *Conveyances from principal to agent closely scrutinized—application of rule.*

Gifts procured by agents and purchases made by them from their principals will be closely scrutinized, and an agent may purchase property from his principal only where he acts in entire good faith and makes full disclosure of all facts within his knowledge affecting the value of the property. The reason for the rule does not apply, however, where there was no prior confidential relation and the execution of a power of attorney creating the relation and the making of a conveyance of property are parts of one transaction. In such a case, it not appearing that the agent possessed any information concerning the property not possessed by his principal, there being no misrepresentation, concealment, or undue influence on the agent's part, nor mental incapacity on the part of the principal, a deed conveying property to him will not be set aside though the consideration was inadequate. *Sumner v. Jones*, 391.

See CORPORATIONS, 1; EVIDENCE, 5; HUSBAND AND WIFE, 1.

PRINCIPAL AND SURETY.

1. *Probate bonds—conclusiveness on sureties of judgment against principal.*

An order made by a circuit judge in probate against an executrix holding her to be indebted to the estate in a certain sum of money, surcharging her with such sum, and directing her to pay same into court, is, in the absence of fraud, conclusive against the sureties in an action on the bond, though the sureties, not being parties to the proceeding in which the order was made, could not have appealed from the order. *Robinson v. Kaee*, 403.

2. *Contractor's bond—liability of surety.*

A surety on the bond of a contractor for a public work given to the Territory of Hawaii and conditioned that the contractor shall deliver the said work to the Territory, fully completed, free from all liens and claims, is not liable at the suit of the Territory for materials furnished to the contractor and used in the completion of the work, where the work is not subject to lien and the claims of the material-men could not lawfully be asserted against the Territory. *Territory v. Pacific Coast Casualty Co.*, 446.

3. *Same—same.*

Under Act 31, Laws of 1913, the Territory of Hawaii cannot maintain an action in its own name upon the bond of a contractor for

PRINCIPAL AND SURETY—Continued.

the recovery of the value of materials supplied to the contractor in the prosecution of the work. *Territory v. Pacific Coast Casualty Co.*, 446.

4. *Same—same.*

Where the bond is for the faithful performance of the contract and the contract provides that the contractor shall "furnish all material necessary to complete the work" but does not in express terms bind him to pay for the same, the surety is not liable for the payment for materials furnished the contractor. *Territory v. Pacific Coast Casualty Co.*, 446.

5. *Liability of surety—county supervisor.*

Where the bond of a county supervisor is conditioned that he will faithfully perform the duties of office prescribed by law, and pay over as directed by law all moneys received by virtue of his office, his surety is liable for money which he receives while acting in a matter in which he is authorized to act, if he wrongfully misapplies such money; as, in doing so, he is not faithfully performing his duty as a county supervisor, but guilty of official misconduct. *County of Hawaii v. Purdy*, 272.

6. *Attachment bond—parties.*

B. sued five defendants alleging them to be co-partners doing business under the firm name of H. F. Co., in assumpsit, and sued out an attachment; two of the defendants claiming to be the members of the partnership, as principals, and L. and G. as sureties, executed a bond for the release of property seized under the attachment, stipulating to pay the judgment that plaintiff should recover against "said defendants;" B. amended his complaint by striking out, as defendants, the names of the three erroneously sued as members of the co-partnership, and obtained judgment against the remaining two defendants as co-partners under the name of H. F. Co.; took out execution which was partially satisfied, and then sued the principals and sureties on the performance bond, when L. paid the balance due on the judgment, and brought this suit against his co-surety for contribution: Held, the amendment of the complaint in the original action introduced no new cause of action, did not increase the liability of the sureties, and did not release them from liability on the bond. *Wong Tin Look v. Goo Wan Hoy*, 540.

7. *Contribution—parties.*

Where a surety pays the principal obligation, and sues his co-surety for contribution, his principal is not a necessary or proper party to the action. *Wong Tin Look v. Goo Wan Hoy*, 540.

8. *Contribution.*

Where one co-surety voluntarily pays the debt of his principal, to be entitled to contribution from his co-surety he must be pre-

PRINCIPAL AND SURETY—Continued.

pared to show that the obligation was a legal and binding one. *Wong Tin Look v. Goo Wan Hoy*, 540.

9. *Contribution—prima facie case.*

Where two sureties undertake that their principal shall perform the judgment of the court in a certain action, and a money judgment is rendered against the principal therein, one surety makes a *prima facie* case against his co-surety for contribution by showing that such judgment was rendered, that the principal did not perform it, and that he has performed it, and the burden is then upon the non-performing surety to show a defense if any there be, to the action against him for contribution. *Wong Tin Look v. Goo Wan Hoy*, 540.

See APPEAL AND ERROR, 1, 11.

PROBATE BONDS.

See BONDS, 1; PRINCIPAL AND SURETY, 1.

PROCESS.

See HEALTH, 3.

PROHIBITION.

1. *Want of jurisdiction.*

The writ of prohibition will not lie to prevent a master in chancery from proceeding under a reference made in an equity suit, the circuit judge sitting at chambers in equity having jurisdiction to order the reference, as it is only in case of want of jurisdiction that this writ will lie. *Scott v. Stuart*, 459.

2. *Contempt proceedings—void order.*

A writ of prohibition may be had to restrain the enforcement of a void order by a circuit court or judge through contempt proceedings though the question of jurisdiction was not first raised in the court below. *Rose v. Ashford*, 469.

3. *When writ lies—proceeding without jurisdiction.*

Prohibition lies to restrain the continuance of a receivership where the order appointing the receiver was beyond the power of the judge to make, even though the judge has jurisdiction of the subject matter of the suit in which the order was made. *Oyama v. Stuart*, 693.

4. *Remedy by appeal.*

Prohibition does not ordinarily lie where the party may obtain relief by appeal, but where a void interlocutory order results in the seizure of property, and under the circumstances there is no other adequate relief for the party whose rights have been invaded, a case permitting the use of the writ appears. *Oyama v. Stuart*, 693.

5. *Raising question of jurisdiction in lower court.*

The question of jurisdiction should, as a general rule, be raised

PROHIBITION—Continued.

first in the lower court, but if the question has once been raised in the case and ruled on adversely, it need not be repeated in immediate connection with the order attacked. *Oyama v. Stuart*, 693.

PROOF.

See **CRIMINAL LAW**, 5.

PROPER PARTIES.

See **EQUITY**, 8; **QUO WARRANTO**, 2.

PROVISO.

See **STATUTES**, 2.

PROXIMATE CAUSE.

See **MASTER AND SERVANT**, 1, 2, 3.

PUBLICATION OF NOTICE.

See **MORTGAGES**, 1; **PARTNERSHIP**, 2.

PUBLIC HEARING.

See **DIVORCE**, 4.

QUANTUM MERUIT.

See **APPEAL AND ERROR**, 17.

QUIET ENJOYMENT.

See **LANDLORD AND TENANT**, 6.

QUIETING TITLE.

1. *Admission in pleadings in another suit as proof of title.*

Upon the trial in a statutory action to quiet title the defendant's admission in a pleading in another suit of the truth of the fact that at a time stated the title was in a person from whom the defendant then claimed and from whom the plaintiff also claims in the action on trial constitutes evidence, available to the present plaintiff, of the fact mentioned and is *prima facie* proof of that fact. *Harrison v. Davis*, 51.

2. *Statutory action—adverse claim.*

One in possession of land claiming title thereto in fee simple under a will, may maintain an action to quiet title under R. L. Chap. 132, against one who, under the same will, claims a remainder in fee in the land contingent upon the death of the party in possession without heirs of his body, such claim being an adverse one within the meaning of the statute. *Paiko v. Boey-naems*, 233.

3. *Statutory action—litigating title between defendants.*

Whether in an action to quiet title to land under Ch. 153, R. L. 1915, when the plaintiff has failed to show title, the defendants

QUIETING TITLE—Continued.

may litigate a disputed title between themselves, *quaere*. *Mer- cer v. Kirkpatrick*, 644.

4. Statutory action—title in stranger.

In an action to quiet title where the plaintiff has adduced evidence of title a defendant who has no title may not defeat the plaintiff's case by showing that one not a party to the action has a title superior to that relied on by the plaintiff. *Harrison v. Davis*, 465.

5. Statutory action—adverse claim defined.

The words "claims an estate or interest" as used in sec. 2085 R. L. 1905, are used in a broad sense, and are not technical in their meaning, and were evidently intended to embrace every species of adverse claim set up by a party out of possession whereby the plaintiff's enjoyment of his property may be interfered with. *Paiko v. Boeynaems*, 233.

6. Statutory action—proof.

At the trial of an action to quiet title under the statute (R. L. Ch. 132) it is incumbent upon the plaintiff to prove a title in or to the land in dispute, and if he fails to do so, it will be unnecessary for the defendant to make any showing. *Harrison v. Davis*, 465.

See APPEAL AND ERROR, 10.

QUO WARRANTO.

1. Demurrer to petition—occupation and user of office.

A demurrer to a petition for a writ of *quo warranto* which recites facts showing that respondent claims to have been elected to an office for a term commencing in the future, and intends to occupy and use such office at a future time, should be sustained, the proceeding being premature. *In re Sherwood*, 385.

2. Parties to the proceeding.

Persons who are registered voters in the district where an election is held, and tax payers, are proper parties to apply, by petition, for a writ of *quo warranto*. *In re Sherwood*, 385.

3. Practice—demurrer—amendment.

In the proceeding under the Hawaiian statutes which is in the nature of *quo warranto* the writ or order is like a summons commanding the respondent to show by what authority he claims to hold an office, and is, in effect, an order to show cause; the sufficiency of the facts is tested by demurrer to the petition, which, if sustained, the writ falls unless the petitioner can amend, the petition being amendable. *In re Sherwood*, 385.

See MANDAMUS, 1.

RECEIVERS.

1. Ground for appointment—danger of loss or injury.

RECEIVERS—Continued.

As a basis for the appointment of a receiver the plaintiff must show, not only that he has an interest in or right to the fund or property, but that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant. *Oyama v. Stuart*, 693.

See PROHIBITION, 3.

REMAINDERMAN.

See HEALTH, 2.

RENT.

See LANDLORD AND TENANT, 4.

REPLEVIN.

1. *Right of possession—evidence.*

In an action of replevin for goods and chattels alleged to have been unlawfully taken and detained, where plaintiff proves ownership and possession at the time of the alleged unlawful taking he has made out a *prima facie* case, and the burden of proving any special right of possession in himself is on the opposite party. *Consolidated Amusement Co. v. Jarrett*, 537.

2. *Same—justification.*

Where a sheriff or party seeks to justify the taking of personal property by virtue of an execution issued upon a judgment, the judgment record and execution must be produced and a levy shown under it. *Consolidated Amusement Co. v. Jarrett*, 537.
See JUDGMENT, 4.

REPUGNANCY.

See WILLS, 1.

RESERVED QUESTIONS.

See APPEAL AND ERROR, 15, 31, 32.

RES GESTÆ.

See ADVERSE POSSESSION, 1, 2.

RES JUDICATA.

See DIVORCE, 6, 7; JUDGMENT, 3, 4, 5.

RESULTING TRUST.

See TRUSTS, 4.

REVERSIBLE ERROR.

See APPEAL AND ERROR, 20; ASSUMPSIT, 1; DIVORCE, 4.

REVIEW OF FACTS, ON APPEAL.

See DIVORCE, 2.

RIGHT OF POSSESSION.

See REPLEVIN, 1, 2.

SALES.

See EMBEZZLEMENT, 4; HUSBAND AND WIFE, 2.

SALARIES AND COMPENSATION.

See CLERKS OF COURTS, 3, 4; GARNISHMENT, 1; MUNICIPAL CORPORATIONS, 2.

SCINTILLA.

See EVIDENCE, 7.

SEAMEN.

See GARNISHMENT, 1.

SEARCH AND SEIZURE.

See CONSTITUTIONAL LAW, 6, 7.

SECONDARY EVIDENCE.

See APPEAL AND ERROR, 16; EVIDENCE, 4.

SENTENCE.

See CONSTITUTIONAL LAW, 5; CRIMINAL LAW, 7.

SEPARATE COURSES OF ACTION.

See DIVORCE, 5.

SERVICE OF PROCESS.

See GARNISHMENT, 3, 4.

SEVERANCE.

See APPEAL AND ERROR, 36.

SHERIFF'S SALES.

See APPEAL AND ERROR, 9.

SPECIAL ADMINISTRATORS.

See APPEAL AND ERROR, 27.

SPECIFIC PERFORMANCE.

1. *Pleading—sufficiency of allegations as to agreement sought to be enforced.*

Where a bill of complaint alleges the drafting and delivery of a lease by respondent, as lessor, to complainant, as lessee, pursuant to prior negotiations had between the parties, a copy of said lease complete in all its terms being attached to the complaint and made a part thereof; the promise of lessor to execute such lease; the entering into possession by the lessee of the demised premises and his occupancy of the same for several months, during which time lessor neglected (without refusing) to execute such lease; the execution of the instrument by lessee; the acceptance

SPECIFIC PERFORMANCE—Continued.

of rent by lessor under the terms of said lease, and the making of permanent improvements on the demised premises by the lessee in reliance on the promise of lessor that he would execute the lease, held, that the complaint sufficiently alleges the agreement sought to be enforced, and the facts stated make a clear case of an offer to execute a lease, accepted and fully performed by complainant and partly performed by respondent. *Sakata v. Yoshikawa*, 288.

See LANDLORD AND TENANT, 6; PLEADING, 4.

SPLITTING CAUSE OF ACTION.

See ACTION, 1.

STAMPED INSTRUMENTS.

See EVIDENCE, 12.

STARE DECISIS.

See COURTS, 2.

STATUTES.

1. *Language of—opium—yen shee.*

A statute (Act 144, Laws of 1913) which declares that "any person who shall use or smoke opium or have the same in his possession," except as provided in sections 1399 and 1401, R. L., "shall be guilty of a misdemeanor and shall be punished" as therein prescribed, is not violated by one who uses or smokes yen shee or has the same in his possession. *Territory v. Ah Goon*, 31.

2. *Construction of—proviso.*

It is not a universal rule that a proviso applies only to the paragraph or clause immediately preceding it. Its application must be gathered from the context and a comparison of all the provisions relating to the subject-matter. The manifest intent of the legislature must be given effect even though the statute should be thereby invalidated. Because the act may be invalid if meaning what it says does not make the words of the act either dubious or ambiguous. In this case held, that the manifest intent of the legislature, as expressed in plain and unambiguous language, is to require all applicants for licenses, whether to do business in the county or city and county or throughout the Territory, to pay all taxes due, including those delinquent, as a condition precedent to the issuing of the license. *In re Kalana*, 96.

3. *Interpretation—words and phrases.*

Section 1831, R. L., as amended, which exempts specified chattels by which a person following one of a number of enumerated occupations, "or other laborer," actually earns his living, from levy and sale under execution, held, not to apply to a person using

STATUTES—Continued.

any of such chattels in conducting a scheme in the nature of a lottery or game of chance. *Fugita v. Motoshige*, 136.

4. *Act 52 of the Session Laws of 1913 construed.*

The reference in section 3 of Act 52 of the Laws of 1913 to sections 2 and 3 of Act 143 of the Laws of 1911, had the effect of making the provisions of those sections applicable to claims to be paid under the Act of 1913; and held, therefore, that the auditor was justified in refusing to issue warrants for the payment of claims under the later act which had not been examined and approved by the treasurer in accordance with the requirements of the earlier act. *In re Goo Wan Hoy*, 157.

5. *Effect of amendment—amendment of statute previously amended.*

Where a statute amends a prior act or section of a statute "so as to read as follows," making changes in or additions to the original enactment, and setting forth the law as so amended, those provisions of the original enactment which are retained are regarded as having been in force from the time of the original enactment and continued in operation by the amendatory statute, the omitted parts being repealed and new provisions becoming operative as of the time when the amendatory act took effect. A second amendatory act need not purport to amend the first amendatory act, but will be effective if it refers to the original enactment only. *Weinzheimer v. Lufkin*, 183.

6. *Necessity of determining validity.*

When the validity of a statute is questioned the same will not be determined by the court unless such determination is necessary to a decision of the case then before the court. *Schoening & Co. v. Miner*, 196.

7. *Primary election—construction.*

The proviso to section 16, Act 151, S. L. 1913, in the following language, to wit, "Provided, however, that any candidate receiving the votes of a majority of the registered voters voting of the district in which he is a candidate shall be thereby duly and legally elected to the office for which he is a candidate at such primary," construed to require a majority of the votes voted at such primary for all purposes, and not merely a majority of those voting for candidates for the particular office. *In re Lightfoot*, 293.

8. *Interpolation in statute.*

Statutory construction permits the implication of words apparently intended for the purpose of upholding and giving force to the legislative will, but does not authorize the interpolation of conditions into a statute—additional terms—not found in the statute considered as a whole. *In re Lightfoot*, 293.

STATUTES—Continued.

9. *Title of amendatory act.*

Where the title to an act amending a certain section of a certain chapter of the Revised Laws expresses one branch or phase of the subject treated in such chapter, the amendatory act is thereby restricted; and, a proviso therein relating to a subject separate and distinct from that expressed in its title, is void. *Territory v. Kua*, 307.

10. *Misleading title.*

The title to Act 99, Laws 1913, reads: "An Act to Amend Section 1323 of the Revised Laws as Amended by Act 151 of the Laws of 1909, Relating to the Issuance of Licenses;" the body of the act contains a proviso relating to the payment of personal and property taxes. Held, that the said title is misleading in so far as the matter contained in said proviso is concerned, the same not being related to, nor allied with, the subject expressed in the title. *Territory v. Kua*, 307.

11. *Construction—penal statute.*

Penal statutes should be construed liberally in favor of the accused and should not be extended in terms by construction; but, the object and purpose of such statutes should not be defeated by refusing to give to the language used its obvious and usual signification. *Territory v. Scully*, 618.

12. *Same—words and phrases—civil proceeding.*

In construing a statute which makes it an offense "to obstruct the course of justice * * * in any suit or proceeding, criminal or civil," the word "proceeding" must be considered as having been used in a broad sense, and not in a restricted one; and, so considered, an application pending before a board of license commissioners for renewal of a license to sell intoxicating liquors is a civil proceeding. *Territory v. Scully*, 618.

13. *Same—referring to common law for meaning of statute.*

Where a statute punishes an act which was a criminal offense at common law, and the statute defines the act in general terms, resort may be had to the common law to ascertain the meaning of the statute. *Territory v. Scully*, 618.

14. *Exception—office of.*

An exception in a statute excludes from the purview a person or thing included in the words. Its office is to draw away from the operation of the statute matters which would otherwise be included. *Territory v. Tan Yick*, 773.

15. *Construction.*

Where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or country or by that of another, that construction is to be given to the later statute. *Territory v. Pacific Coast Casualty Co.*, 446.

STATUTES—Continued.

16. *Construction.*

In construing a statute the courts are bound, if possible to give effect to all its parts, and no sentence, clause or word shall be construed as unmeaning or surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute. *In re Pringle*, 557.

See APPEAL AND ERROR, 31, 35; CLERKS OF COURTS, 2; CONSTITUTIONAL LAW, 1, 2, 3, 4, 5; CORPORATIONS, 5; CRIMINAL LAW, 1; DESCENT AND DISTRIBUTION, 1, 2; ELECTIONS, 2; LIMITATION OF ACTIONS, 1; MECHANICS' LIENS, 1; PRIMARY ELECTIONS, 1; QUIETING TITLE, 2, 3, 4; TAXATION, 1.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTE OF USES.

See TRUSTS, 2.

SUMMARY POSSESSION.

See LANDLORD AND TENANT, 1, 2, 7.

SUMMONS.

See GARNISHMENT, 5, 6.

SUPERVISORS.

See COUNTIES, 1, 2; PRIMARY ELECTIONS, 1, 2; PRINCIPAL AND SURETY, 5.

SUPREME COURT.

See COURTS, 4; JUDGES, 1; MANDAMUS, 4.

SURCHARGING ACCOUNT.

See EXECUTORS AND ADMINISTRATORS, 1.

SURETIES.

See PRINCIPAL AND SURETY.

TAXATION.

1. *Inheritance tax.*

By the will of A., who died in 1903, a large residuary estate was bequeathed and devised to trustees in trust for the use and benefit of his widow for life, with power in her to name the person or persons who should succeed to such estate, which power she exercised by will in 1914; the trustees paid to the territorial treasurer, under protest, on his demand, the inheritance tax imposed by Act 147, S. L. 1909, amendatory of Act 102, S. L. 1905, upon the interest of one of the appointees in the said estate, and, with such appointee, commenced an action to recover the same

TAXATION—Continued.

back from the treasurer; the plaintiffs contended that the inheritance tax for which such interest is liable is that imposed by Ch. 106, S. L. 1892, which was repealed in 1905. Held: The tax was properly collected; that the Act of 1909 applies, it being in force at the time of the transfer under the exercise of the power of appointment, the tax being upon the transfer and not upon the property. *Robinson v. Treasurer*, 742.

2. *Valuation of property of Catholic Mission, Hilo.*

Upon the evidence, a valuation of \$40,725, placed by the tax appeal court on the property of the Catholic Mission at Hilo, is sustained. The fact that other properties in Hilo have been assessed too low, if the assessment in question was made in good faith, does not afford a reason for reducing the assessment. *In re taxes, Catholic Mission, Hilo*, 764.

See CONSTITUTIONAL LAW, 1, 2, 8; STATUTES, 2.

TEMPORARY INJUNCTION.

See INJUNCTION, 4, 5.

TENANTS IN COMMON.

See JUDGMENT, 4; LANDLORD AND TENANT, 4; PARTIES, 1; PARTITION, 1.

TERRITORIES.

1. *Legislative powers under Organic Act.*

By section 55 of the Organic Act the legislature of this Territory was vested with the power of taxation with all the completeness and effectiveness with which that power is vested in and exercised by the legislature of any of the States, and also the right to legislate in exercise of the police power. *In re Craig*, 20 Haw. 483. *In re Kalana*, 96.

TESTATOR.

See WILLS.

TITLE.

See LANDLORD AND TENANT, 1; STATUTES, 9, 10.

TRAVELLING FEES.

See GARNISHMENT, 8.

TRESPASS QUARE CLAUSUM FREGIT.

1. *Proof of locus in quo.*

In *trespass quare clausum fregit*, which is a local action, if the declaration gives the boundaries of the *locus in quo* or otherwise describes it with certainty it must be proved as laid and the plaintiff can recover only on proof of a trespass where he lays it. *Mendes v. de Cova*, 636.

2. *Same—title must be proved as alleged.*

TRESPASS QUARE CLAUSUM FREGIT—Continued.

Where plaintiff relies expressly on a title by grant or of record he must prove it and evidence of a title otherwise derived is inadmissible. *Mendes v. de Cova*, 636.

TRIAL.

1. *Improper remarks of judge.*

In a criminal prosecution, where there is no lack of evidence to support a conviction, impatient and improper remarks of the court to defendant's counsel will not warrant a reversal. The evidence must be looked to to ascertain whether the verdict is responsive to it or to extraneous matter. In this case held, that while the remarks of the judge were improper and apparently uncalled for they do not warrant a reversal of the case. *Territory v. Peter*, 132.

TROVER.

See **BANKRUPTCY**, 2.

TRUST.

1. *Bill for instructions by trustee.*

The proper purpose of a bill for instructions is to secure for a trustee the directions of a court of equity to guide him in executing the trust where there are conflicting interests and there is doubt as to the proper course to pursue in administering the trust or disposing of the fund, with the view to obviating future liability or controversy. *Hawaiian Trust Co. v. Galbraith*, 78.

2. *Statute of uses—trust to protect estate.*

If the purpose of a trust is to protect the estate for a given time or until the death of some one, the operation of the statute of uses is excluded and the trusts or uses remain mere equitable estates. *Harrison v. Davis*, 51.

3. *Ratification of lease by trustee—waiver of right to occupy trust property.*

Where land is conveyed in trust to pay the rents, issues and profits to D during his life "or in the discretion" of D "to permit him to reside upon" the land "and while so residing to use the same for grazing or agricultural purposes", ratification by D of a lease by the trustee to another operates as a waiver of D's right to reside upon and use the land in the manner mentioned. *Harrison v. Davis*, 51.

4. *Contingent interest—resulting trust—interest by implication.*

H, on March 27, 1909, delivered to C a certificate of stock in a corporation made out in the name of C as trustee for L, a recently married daughter of H, together with a letter in which it was stated *inter alia* that "the trust for Lottie Lee is to cause the dividends to be paid to her during the three years from January 1st next and if she shall then be living to transfer the shares to

TRUST—Continued.

her or hold them in trust for her benefit as she may in writing request, unless at the end of three years she shall have no child living, in which case the trustee is to hold the stock paying her the dividends during her lifetime, with power to change the investment and vary it at any time at discretion and at her death to divide the trust funds or securities equally among her sisters who shall then be living, and if none shall then be living among their children then living, my object being, as Mr. Chater will observe, that as to these additional 585 shares they shall remain in my family." The letter contained other directions with reference to other certificates of stock given at the same time either directly or in trust for other daughters. L gave birth to a son on August 30, 1909, and died on September 3, 1909. After the delivery of the letter and certificate to C the dividends on the stock were forwarded to L by H or C, receipts therefor being given by L to C as trustee. After the death of L, C paid the dividends to H and finally endorsed and delivered back to H the certificate of stock which thereupon was given by H to his daughter M. Held, that the gift of the stock to L was contingent upon her being alive on January 1, 1913; that the gift lapsed upon the death of L and the trust resulted to H; that there was not an implied gift to L's son upon the death of his mother; and that the gift of the dividends was intended to be solely to L personally, was contingent upon her being alive at the time the direction to pay was to take effect, and lapsed by reason of her death before that time. *Chater v. Carter*, 34.

5. *Alienation of equitable interest—object of trust.*

The right of alienation is not a necessary incident to an equitable interest to income or support for the life of the beneficiary, and it does not exist where it would be destructive of the trust or is incompatible with its purposes though there be no express prohibition against alienation. *Harrison v. Davis*, 465.

6. *Investment of trust funds.*

In this jurisdiction the rule as to the investment of trust funds is that the trustee must act with honesty, prudence and faithfulness, and exercise such sound discretion as prudent business men exercise in the investment of their own moneys, having regard not only to the income, but to the security of the principal, and to the permanency of the investment. *Brown v. Brown*, 715.

7. *Investment in second mortgage.*

The application of the rule to an investment of trust funds in a second mortgage upon real estate, assuming the existence of the requisite honesty and good faith, would involve the question whether, under all the circumstances, it could be regarded as a sound and prudent business transaction. The two principal matters to be considered are, (1) the value of the security, and (2)

TRUST—Continued.

the ability of the trustee to protect the investment in the event of the foreclosure of the senior mortgage. *Brown v. Brown*, 715.

8. *Same*.

Under the special facts of this case the taking of a second mortgage for the purchase price upon the sale of incumbered property held proper. *Brown v. Brown*, 715.

See APPEAL AND ERROR, 2; CORPORATIONS, 1, 2.

ULTIMATE FACTS.

See PLEADING, 5.

ULTRA VIRES CONTRACTS.

See CORPORATIONS, 6.

UNDUE INFLUENCE.

See FRAUD, 1.

VACANT LAND.

See HEALTH, 5.

VALUE.

See EMBEZZLEMENT, 9.

VARIANCE.

See EMBEZZLEMENT, 5; TRESPASS QUARE CLAUSUM FREGIT, 2.

VENDITIONI EXPONAS.

See APPEAL AND ERROR, 9.

VERDICT.

1. *Excessive damages*.

A verdict for \$13,000 damages held to be not excessive where the evidence shows that the plaintiff was a strong, healthy, robust man at the time of the accident, forty years of age, earning six dollars per day, and by reason of the injury complained of suffered a fracture of the skull, concussion of the brain, a central dislocation of the hip, a distortion of the spine, impairment of vision and hearing, considerably diminished earning capacity and had continually suffered great physical pain; the assessment of damages being left, by law, to the discretion of the jury, whose verdict will not be disturbed unless so excessive and outrageous, under the evidence, as to demonstrate that they permitted their passions and prejudices to mislead them into giving a verdict against the rules of law. *Ward v. I.-I. S. N. Co.*, 488.

See APPEAL AND ERROR, 17; EVIDENCE, 6.

VERIFICATION OF BILL.

See EQUITY, 12.

VOID ORDERS.

See PROHIBITION, 2, 4.

VOLUNTARY PAYMENT.

See LANDLORD AND TENANT, 5.

VOTING.

See CORPORATIONS, 2, 3.

VULGAR LANGUAGE.

See CRIMINAL LAW, 2.

WAGES.

See GARNISHMENT, 1.

WAIVER.

See ACTION, 1; APPEAL AND ERROR, 7; DISMISSAL AND NONSUIT, 2; EMBEZZLEMENT, 6; GARNISHMENT, 7; LIMITATION OF ACTIONS, 2; TRUSTS, 3.

WIDOW.

See WILLS, 4.

WILLS.

1. *Construction—repugnancy—general and specific provisions.*

The rule that where two clauses in a will are in irreconcilable conflict the later one will prevail does not apply where a contrary intent has been manifested. Where there is an inconsistency between a general and specific provision the latter will prevail regardless of the order in which it stands in the will, the presumption being that the testator intended that the specific provision would operate upon the property mentioned in it and the general provision upon other property. *Paiko v. Boeynaems*, 233.

2. *Construction—intent of testator—Hawaiian language.*

It is the duty of the court to, if possible, find a meaning for and give effect to the language used to express the intention of a testator, and in construing a will written in the Hawaiian language the court will take a broad view. The Hawaiian word "no," meaning "to" or "for" has always been regarded as operative and sufficient to constitute a devise or bequest when used in a will. *Magoon v. Kapiolani Estate*, 510.

3. *Construction of general and specific provisions.*

Where a specific devise conflicts with a general devise it is generally a reasonable presumption that the testator intended that the specific provision would operate upon the property named in it and the general provision upon other property. *Magoon v. Kapiolani Estate*, 510.

4. *Dower—testamentary provision in lieu of—evidence of acceptance by widow.*

Under a statute requiring a widow to make her election to take

WILLS—Continued.

under a testamentary provision in the will of her husband or be endowed of his lands, the widow will be presumed to have taken her dower unless there is evidence of some unequivocal act on her part showing an election to accept the testamentary provision instead. *Magoon v. Kapiolani Estate*, 510.

5. *Lapsed devise—presumption against intestacy.*

Where a specific devise lapsed, held, in order to effectuate the apparent intention of the testator, that title to the property passed to other devisees under a general provision in their favor. The presumption against partial intestacy is a strong one. *Magoon v. Kapiolani Estate*, 510.

6. *Omissions—supplying words.*

Where, in a will, there is an entire absence of designation of the object of an intended gift the attempt to make the gift must be held to have failed. Words omitted by the testator may be supplied by the court only when it is clear from the words used what words have been omitted. *Mercer v. Kirkpatrick*, 644.

7. *Intention of testator—evidence of surrounding circumstances.*

Where a will contains a latent ambiguity, or its language is uncertain and indefinite, extrinsic evidence is admissible to show the facts and circumstances that surrounded the testator at the time he executed his will so as to assist the court in ascertaining his intention. But where the testator has omitted to designate, expressly or impliedly, the object of an intended gift, the omission may not be supplied upon extrinsic evidence of intention. *Mercer v. Kirkpatrick*, 644.

8. *Extrinsic evidence—declarations of testator.*

Evidence of declarations made by a testator as to the intent of his will is not admissible to supply an omission consisting in the entire failure to designate the object of an intended gift. *Mercer v. Kirkpatrick*, 644.

WITNESS.

1. *Protection of by the court.*

Where the trial court is convinced that a witness does not understand a question it should explain the question or cause it to be explained to the witness. The court should protect a witness from confusion by questions that place a wrong construction on previous statements by the witness. *Territory v. McGregor*, 786. See APPEAL AND ERROR, 19, 33; DIVORCE, 2; EVIDENCE, 1, 2; INDICTMENT AND INFORMATION, 2; INSTRUCTIONS, 1.

WORDS AND PHRASES.

1. *"Or"—"and."*

The word "or" is sometimes used in the copulative sense and as synonymous with "and" in deeds and contracts as well as in statutes. The word will be so construed whenever it is evident

WORDS AND PHRASES—Continued.

that it was intended to have that effect. *McBryde Sugar Co. v. Andrade*, 578.

2. "Without."

The word "without" as used in R. L. 1915, Sec. 3897, does not imply an exception. *Territory v. Tan Yick*, 773.

WRIT OF ERROR.

See APPEAL AND ERROR, 3, 7, 22, 23, 24, 34, 35, 36, 37, 38, 39.

WRIT OF POSSESSION.

See APPEAL AND ERROR 22, 23, 24.

WRIT OF PROHIBITION.

See PROHIBITION.

YEN SHEE.

See STATUTES, 1.

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